

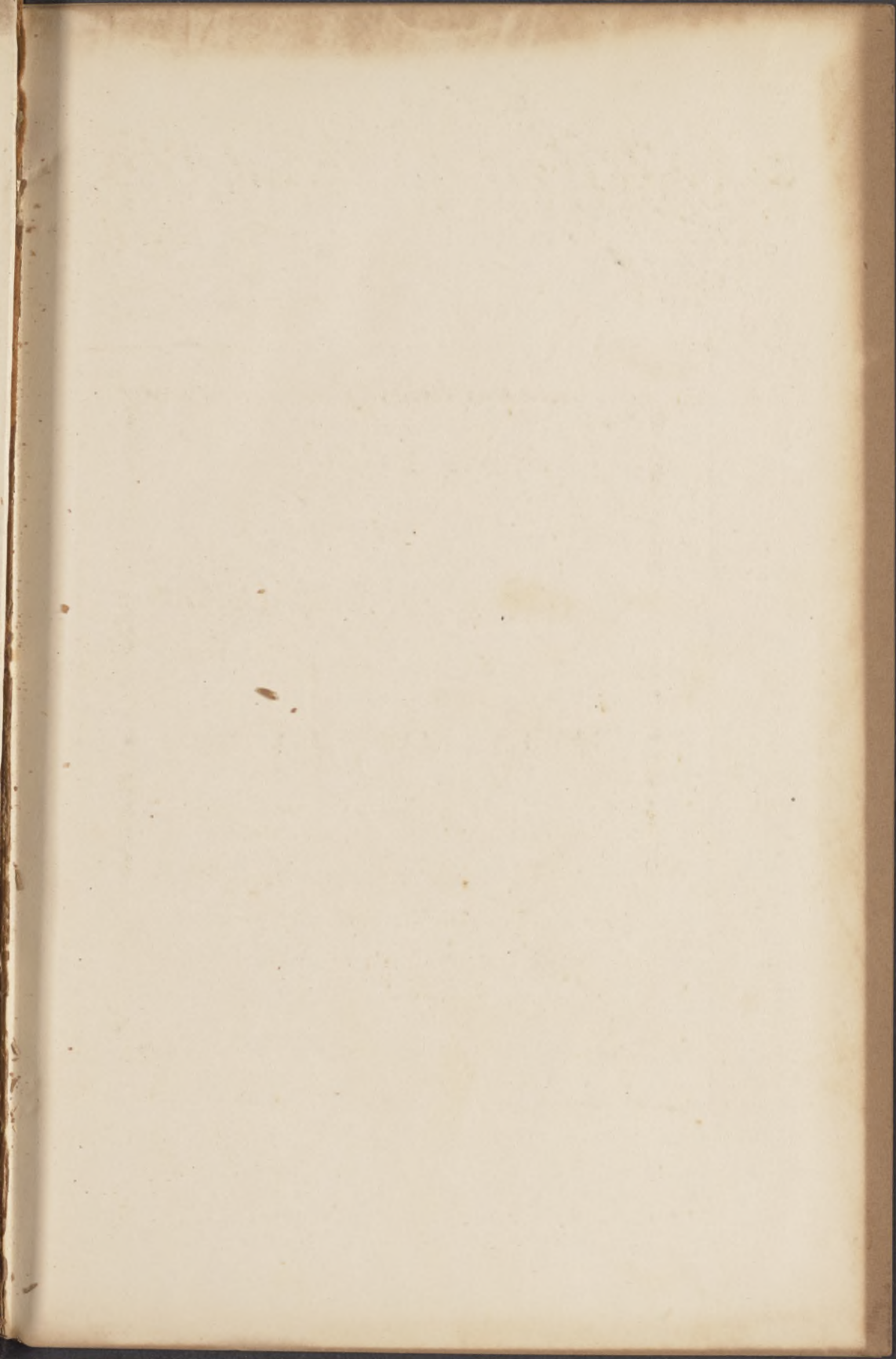
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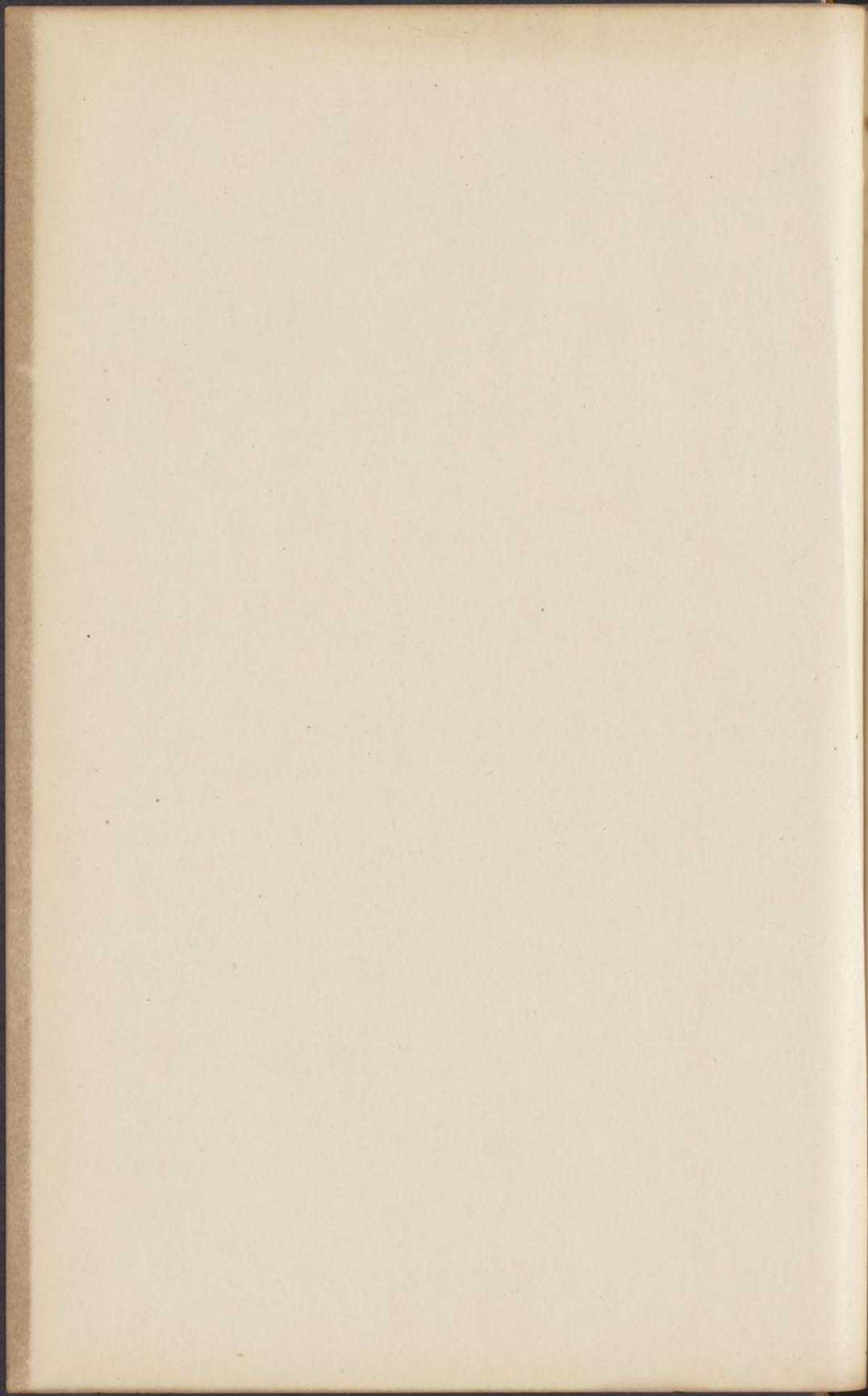


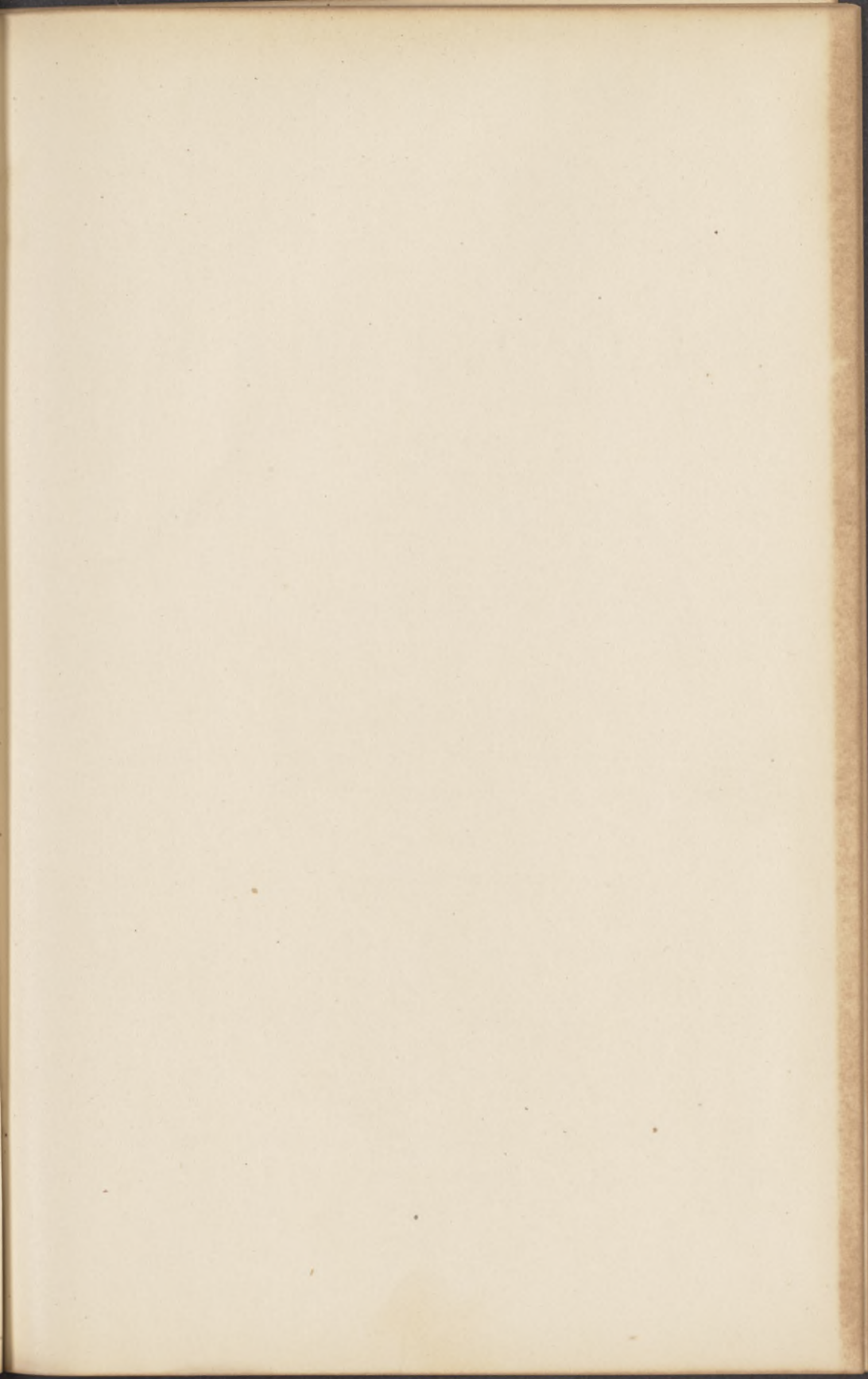
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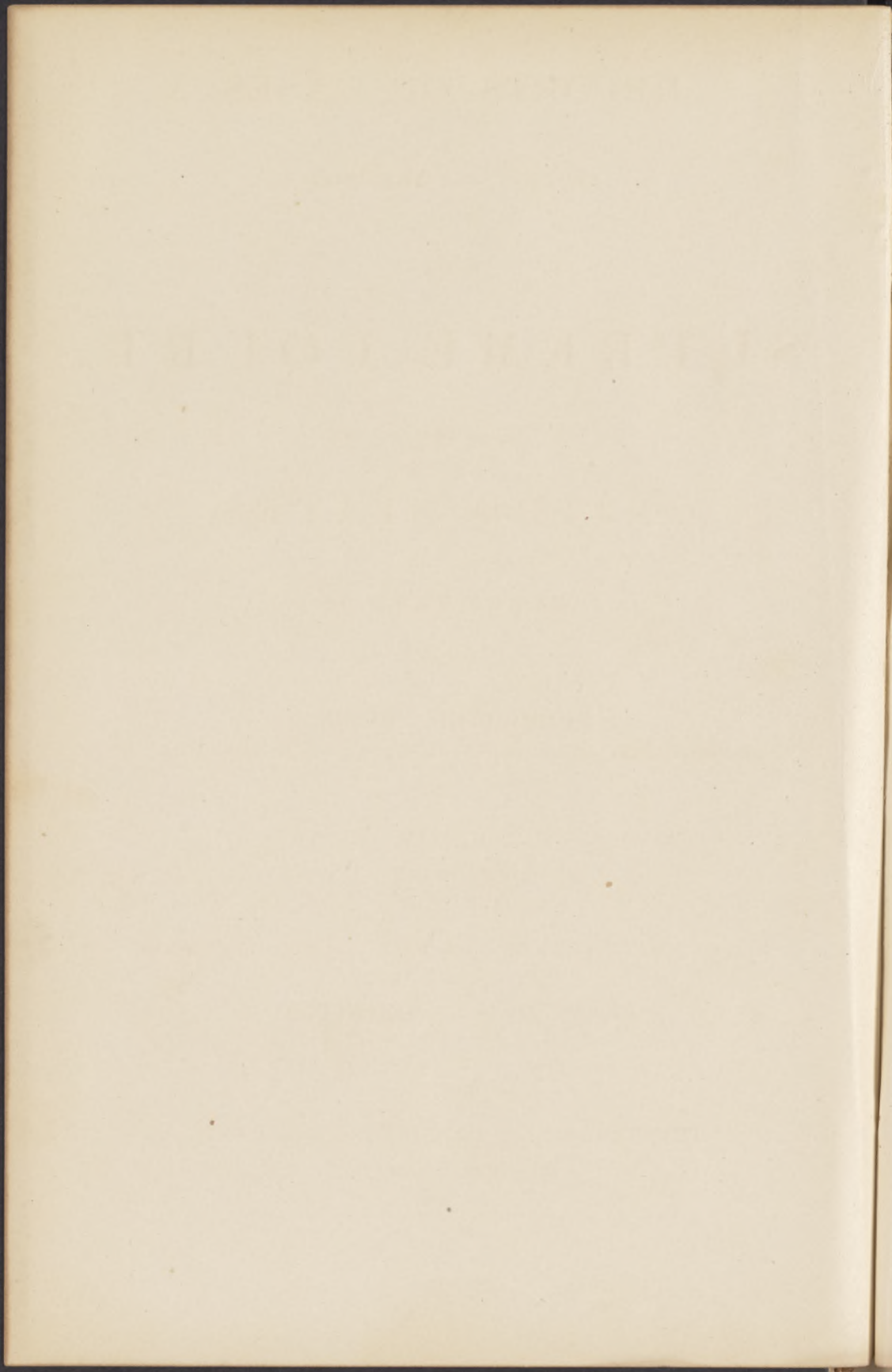
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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

S U P R E M E C O U R T

OF THE

UNITED STATES,

JANUARY TERM 1840.

By RICHARD PETERS,

COUNSELLOR AT LAW, AND REPORTER OF THE SUPREME COURT OF THE UNITED STATES.

VOL. XIV.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

THE BANKS LAW PUBLISHING COMPANY

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OBITUARY.

THOMAS SWANN, ESQ.

MR. GILPIN, the Attorney-General, made the following remarks :—"I have been deputed by the bar to perform the melancholy duty of announcing to the court the death of Thomas Swann ; and respectfully soliciting permission to have inscribed among the records of this high tribunal, the expression of their respect for his memory, and esteem for his character as a lawyer and a man. In a scene which he has so often adorned by the exercise of his genius, and distinguished professional ability ; among those who have so often admired, as friends and associates, the mild beneficence of his deportment, and his unsullied probity and worth ; it would be vain for me to dwell on personal traits and incidents, which are felt with more truth than I have the ability to delineate them. He was constantly called on, through a long life, to discharge important public and private trusts ; and his duty was performed without a single stain. As the reward for this, by him most prized, would have been the approbation of the chief ministers of the profession to which he was devoted, I feel well assured, that I shall not ask the court, without success, to add that sanction to the sincere and spontaneous testimony of his brethren of the bar. And I now move the court, in pursuance of the fourth resolve contained in the subjoined proceedings of the bar and officers of the court, to have said proceedings entered on the records of this court."

To which Mr. Chief Justice TANEY replied :—"The court receive with great sensibility the communication made by the bar. In the death of Mr. Swann, we feel that we have lost, not only an eminent lawyer, to whom we have often listened with pleasure ; but also an esteemed and valued friend, whose kind heart, and upright principles, endeared him to all who had an opportunity of knowing him. We sincerely deplore his loss, and will cordially unite with you in paying to his memory the honors so justly due."

Whereupon, it is ordered by the court that the following proceedings be entered upon the minutes ; viz.—

At a meeting of the gentlemen of the bar of the supreme court of the United States, and of the officers of the court, at the court-room in the Capitol, on Tuesday, the 28th instant, the Honorable Samuel L. Southard was appointed chairman, and Francis S. Key appointed secretary. The following resolutions were submitted by General Walter Jones, and unanimously adopted, viz :

Resolved, That the members of this bar, and the officers of this court, feel, with deep sensibility, the loss which the profession and the country have sustained, in the death of Thomas Swann, a member of this bar.

Resolved, That we cherish the highest respect for the professional learning of the deceased ; for the purity and uprightness of his professional life ; and for the amiable and excellent qualities which belonged to him as a man.

Resolved, That, to testify these sentiments, we will wear the usual badge of mourning, for the residue of the term.

Resolved, That Mr. Gilpin, the Attorney-General of the United States, do move the court, that these resolutions be entered upon the minutes of their proceedings.

JOSEPH M. WHITE, ESQ.

MR. GILPIN, the Attorney-General of the United States, made the following remarks :—"I have been requested, by a meeting of the members of the bar and officers of the court, to present a copy of the resolutions they have adopted, on being apprised of the death of Joseph M. White, of Florida ; and respectfully to ask that, with the approbation of the court, they may be inserted among the records of its proceedings. These records already give abundant and various evidence of the distinguished legal ability of Mr. White, and the debt of gratitude that is due from his associates, for the profound researches he made in branches of jurisprudence not previously brought to the notice of the profession ; for the light his own intellect has shed upon them ; and for the collection of authentic and necessary documents which his zeal and industry have made. Such acts entitle him to the grateful remembrance of his professional brethren ; but with these he united an amenity of manner, and a generosity of disposition, which secured him also their strong personal affection and regard. In bearing their testimony to his merits, and in expressing their feelings on his death, they will derive no small gratification, if this evidence of them is permitted to be placed in the archives of that tribunal, whose approbation is among the highest

rewards to which an American lawyer can aspire. I move, in accordance with one of the resolutions to which I have referred, that these proceedings of the members of the bar and officers of the court, be entered among its records."

To which Mr. Chief Justice TANEY made the following reply :—"The court will cordially unite with the bar in paying the proposed honors to the memory of Mr. White. His learning, high character, and amiable deportment, had won for him the respect and esteem of the court ; and we sincerely deplore his loss. He has been cut off in the prime of his life, and in the midst of his usefulness ; but his last work, upon a highly important branch of the law, will be an enduring monument of his talents and industry. The court will order the proceedings of the bar to be entered of record, according to their request."

Whereupon, it is ordered by the court, that the following proceedings be entered upon the minutes ; viz.—

At a meeting of the gentlemen of the bar of the supreme court of the United States, and of the officers of the court, at the court-room in the Capitol, on Tuesday, the 4th of February 1840, the Honorable Samuel L. Southard was called to the chair, and General Walter Jones appointed secretary. The following resolutions were submitted by Joseph R. Ingersoll, Esq., and unanimously adopted, viz :

Resolved, That the members of this bar, and the officers of this court, feel, with deep sensibility, the loss which the profession and the country have sustained, in the death of Joseph M. White, a member of this bar.

Resolved, That we cherish the highest respect for the professional learning of the deceased ; for the purity and uprightness of his professional life ; and for the amiable and excellent qualities which belonged to him as a man.

Resolved, That, to testify these sentiments, we will wear the usual badge of mourning, during the residue of the term.

Resolved, That Mr. Gilpin, the Attorney-General of the United States, do move the court that these resolutions be entered upon the minutes of their proceedings.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES,
DURING THE PERIOD OF THESE REPORTS.

Hon. ROGER B. TANEY, Chief Justice.

" JOSEPH STORY,	}	Associate Justices.
" SMITH THOMPSON,		
" JOHN McLEAN,		
" HENRY BALDWIN,		
" JAMES M. WAYNE,		
" PHILIP P. BARBOUR,		
" JOHN CATRON.		
" JOHN McKINLEY,*		

HENRY D. GILPIN, Esq., Attorney-General.

WILLIAM T. CARROLL, Clerk.

ALEXANDER HUNTER, Marshal.

RICHARD PETERS, Reporter.

* Mr. Justice McKinley was absent during the term.

1890

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

REPORT OF THE

LABORATORY

OF

THE

UNIVERSITY

OF

CHICAGO

FOR

THE

YEAR

1890

BY

JOHN

W. COOPER

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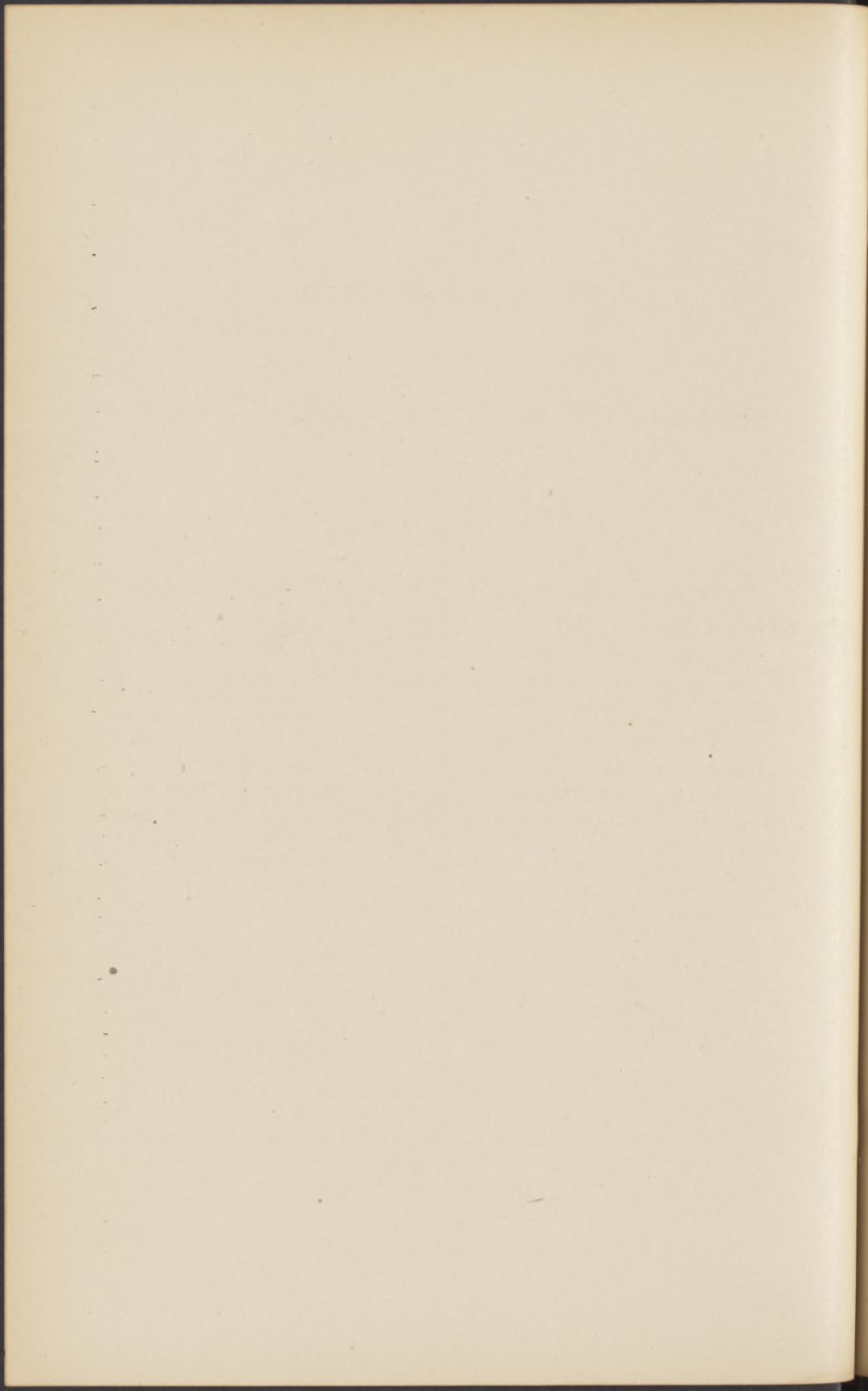
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RULES AND ORDERS
OF THE
SUPREME COURT OF THE UNITED STATES.

It is ordered by the court, that the rule, No. 36, passed at January term 1830, be altered, so that the last sentence thereof shall read as follows :
“Every cause which shall have been twice called in its order, and passed, and put at the foot of the docket, shall, if not again reached during the term it is called, be continued to the next term of the court.”

February 5th, 1840.



CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1840.

JOSEPH EVANS, Plaintiff in error, *v.* STERLING H. GEE, Defendant
in error.

Error.—Final judgment.

It is the settled doctrine of the supreme court of the United States, that a writ of error does not lie from the circuit court on a refusal of a motion to quash an execution; such refusal not being a final judgment, under the 22d section of the judiciary act of 1789. *Boyle v. Zacharie*, 6 Pet. 648, cited and affirmed.

ERROR to the Circuit Court for the Southern District of Alabama. In the circuit court of Alabama, an action was instituted by Sterling H. Gee, the defendant in error, against Thomas Evans, on a bill of exchange drawn by Harris G. Evans in favor of Thomas Evans, on George M. Rives, of Mobile, for \$5350 dated 16th December 1834, due twelve months after date, negotiable and payable at the office of discount and deposit of the branch Bank of the United States, at Mobile for value received; and protested for non-acceptance.

The declaration did not charge that notice of the non-acceptance was given to the indorser; and no proof was given at the trial of such notice. To this declaration, the defendant (the indorser of the bill) demurred, and the plaintiff was nonsuited; afterwards, at the same term, the nonsuit was struck out, and the cause continued. At the next term, a jury was empannelled, who found a verdict for plaintiff, on which judgment was entered. Thomas Evans, the defendant in this judgment, died 12th September 1837; and on the 16th March 1838, a *fieri facias* issued on the judgment.

*The administrator of the deceased made a motion to quash this execution, at May term 1838; but the court overruled the motion, and gave judgment, sustaining the execution. The defendant prosecuted this writ of error.

The case was argued by *Key*, for the plaintiff in error. No counsel appeared for the defendant.

Evans v. Gee.

For the *plaintiff* in error, it was contended, that the judgment of the circuit court was erroneous, because it did not appear on the record that a plea was filed by the defendant to the plaintiff's declaration ; or that any issue was joined before the trial of the cause. 2. No notice of the non-acceptance of the bill of exchange was charged in the declaration, nor proved at the trial. 3. No judgment was given by the court on the demurrer of the defendant. 4. The judgment of the circuit court sustaining the execution was erroneous.

Mr. Key stated that the cause had been brought up, mainly, upon the motion to quash the execution ; and the question was, whether the court would sustain a writ of error on that ground : he cited, 4 Cranch 324 ; 6 Ibid. 233, 235 ; 7 Wheat. 534 ; 8 Pet. 259. In the case before the court, the execution was issued against the property of a dead man. Thomas Evans died in 1837. A case was decided by this court which goes fully up to the question in this case. *Boyle v. Zacharie*, 6 Pet. 648.

CATRON, Justice, delivered the opinion of the court.—The principal matters appearing in the record are not now open to investigation, being the same adjudged of by this court in 1837 ; the report of which is found in 11 Pet. 81. The original judgment against Thomas Evans was rendered at May term 1836. No execution seems to have issued until 16th March 1838, when one was taken out bearing *teste* the second Monday of October 1837, and returnable the second Monday of April, 1838. Nothing appears in the record showing that Thomas Evans was dead, save an affidavit of one of his sons, and the circumstance that the administrator's name is used in prosecuting the writ of error : but no suggestion of the death of Thomas Evans, nor any revival of the judgment against his administrator, is found.

The execution was levied on sundry slaves, and a bond given for their delivery, which recites that the execution, in virtue of which the levy was made, bore *teste* at May term 1836 ; and to this date the writ may have had relation, by the laws of Alabama, and the facts of the case. One of the sons of Thomas Evans made an affidavit, stating his father to have died on the 12th day of September 1837, on which the motion to quash the execution and delivery-bond was founded. The motion was refused ; but for what

*3] particular reason, does not *appear ; nor does this court feel itself authorized to inquire. It is the settled doctrine here, that a writ of error does not lie upon the refusal of a motion to quash an execution ; such record of refusal not being a final judgment in the sense of the 22d section of the judiciary act. We will content ourselves by referring to the opinion of the court in the cause of *Boyle v. Zacharie*, 6 Pet. 654. It is, therefore, ordered, that the writ of error be dismissed, and the *supersedeas* discharged.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of Alabama, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed, with costs ; and that this cause be and the same is hereby remanded to the said circuit court, with directions to proceed therein according to law and justice.

*The Lessee of MARGARET LATTIMER and others, Plaintiffs in error,
v. WILLIAM POTEET, Defendant in error.

Indian treaties.

Ejectment for 49,920 acres of land, in the state of North Carolina, claimed by the plaintiffs under a grant from the state, dated 20th July 1796, to William Cathcart, founded on entries made in the office of the entry-taker, in the county of Buncombe, in the state of North Carolina, after the 3d of February 1795, within the limits of the county; the land lay wholly within the limits of the territory specially described and set forth in the fifth section of the act of 1783, entitled an act for opening the land-office of the state of North Carolina. The claim of the plaintiffs in the ejectment was resisted, on the ground, that the grant under which the plaintiffs claimed, was, at the time of its emanation, wholly within the territory allotted to the Cherokee Indians, and was null and void; as such entries and grants were prohibited by the sixth section of the act. It was held, that the title under which the plaintiffs claimed, was invalid.

Construction of the treaties with the Cherokee Indians, relative to lands within the boundary, and of the acts of the legislature of the state of North Carolina, relative to the occupation and entry of lands within the Indian boundary.

It will not be denied, that the parties to a treaty are competent to determine any dispute respecting its limits; in no mode can a controversy of this nature be as satisfactorily determined as by the contracting parties. If their language in the treaty be wholly indefinite, or the natural objects called for uncertain or contradictory, there is no power but that which formed the treaty which can remedy such defects.

It is a sound principle of law, and applies to the treaty-making power of the government of the United States, whether exercised with a foreign nation or an Indian tribe, that all questions of boundary may be settled by the parties to the treaty; and to the exercise of that high function of the government, within its constitutional powers, neither the rights of a state, nor of an individual, can be interposed.

The Indian title being a right of occupancy, the state of North Carolina had the power to grant the fee in those lands, subject to this right.

ERROR to the Circuit Court of North Carolina.

This case was argued at January term 1839, by *Coxe*, for the plaintiffs in error; and by *Webster*, for the defendant. It was held under advisement until this term. The case is fully stated in the opinion of the court.

MCLEAN, Justice, delivered the opinion.—This case comes before the court on a writ of error to the circuit court of North Carolina. The lessors of the plaintiff brought their action of ejectment, to recover the possession of 49,920 acres of land, in Haywood county, described in the declaration by metes and bounds. On the trial, certain exceptions were taken by the plaintiff to the rulings of the court; and the verdict being not guilty, a judgment in favor of the defendant was entered. To revise this judgment, this writ of error is prosecuted.

The lessors of the plaintiff, to sustain their action, offered in evidence a grant from North Carolina to William Cathcart, for the land described in the declaration, dated the 20th July 1796, and founded *on entries made in the entry-taker's office of the county of Buncombe, in said [*5 state, in the year 1795, within the limits of said county. It was admitted, that the title, if any, had descended to the lessors of the plaintiff, and that, at the commencement of the action, the defendant was in possession; and also, that the land was within the limits of the territory described in the fifth section of the act of North Carolina, of 1783, entitled an act for opening the land-office for the redemption of specie and other certificates, &c.

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And the great questions arising out of the instructions are, whether, at the dates of the entry and grant, the land was within the Indian country? and if it was, whether the entry and grant were void?

The limits of the Indian country, within the state of North Carolina, were established by treaties made between the United States and the Cherokee tribe of Indians. The first treaty was concluded at Hopewell, the 20th November 1785. The fourth article of this treaty declared, "that the boundary allotted to the Cherokees for their hunting-grounds, between the said Indians and the citizens of the United States, &c., shall begin at the mouth of Duck river, on the Tennessee; thence running north-east to the ridge dividing the waters running into Cumberland from those running into the Tennessee; thence easterly, along the said ridge, to a north-east line, to be run, which shall strike the river Cumberland, forty miles above Nashville; thence, along the said line, to the river; thence, up the said river, to the ford where the Kentucky road crosses the river; thence to Campbell's line, near Cumberland Gap; thence to the mouth of Cloud's creek on Holston, thence to the Chimney-top mountain; thence to Camp creek, near the mouth of Big Limestone on Nalichuchey; thence, a southerly course, six miles, to a mountain; thence south, to the North Carolina line; thence to the South Carolina Indian boundary; and along the same, south-west, over the top of the Occunna mountain, till it shall strike Tugalo river; thence, a direct line, to the top of the Currahee mountain; thence to the head of the south fork of the Occunna river."

The treaty of Holston, which was concluded the 2d July 1791, altered the limits, as established by the Hopewell treaty, and declared that "the line should begin at the top of the Currahee mountain, where the creek line passes it; thence, a direct line to Tugalo river; thence, north-east, to the Occunna mountain, and over the same, along the South Carolina Indian boundary, to the North Carolina boundary; thence, north, to a point from which a line is to be extended to the river Clinch, that shall pass the Holston at the ridge which divides the waters running into Little river from those running into the Tennessee; thence, up the river Clinch, to Campbell's line, and along the same, to the top of Cumberland mountain; thence, a direct line, to the Cumberland river, where the Kentucky road crosses it; thence, down the Cumberland river, to a point from which a south-west line will strike the ridge which divides the waters of Cumberland from those of Duck river, *6 } forty miles above Nashville; *thence, down the said ridge, to a point from whence a south-west line will strike the mouth of Duck river. And in order to preclude for ever all disputes relative to the said boundary, the same shall be ascertained and marked plainly, by three persons appointed on the part of the United States, and three Cherokees on the part of their nation."

Another treaty was made with the Cherokees, at Philadelphia, the 26th June 1794, in which it was stated that the treaty of Holston had not been fully carried into effect; and in the second article, it was "stipulated, that the boundaries mentioned in the fourth article of the said treaty shall be actually ascertained and marked, in the manner prescribed by the said article, whenever the Cherokee nation shall have ninety days' notice of the time and place at which the commissioners of the United States intend to commence their operation."

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The whole extent of the line designated by this treaty, never appears to have been run and marked. Some parts of it were not run, because the country through which it passed was mountainous and uninhabitable. On the 7th October 1792 (1 American State Papers, Indian Affairs, 630), Governor Blount having given the notice to the Cherokees required by the treaty, under the directions of the secretary of war, instructed David Campbell, Charles McClung and John McKee, commissioners for extending the line between the United States and the Cherokees, according to the treaty of Holston, to meet the next day, at Major Craig's, on Nine Mile creek, to extend the line. And they were instructed, in case the commissioners appeared on the part of the Indians, to run the line; but if the Indians did not attend, they were required to examine where the ridge which divides the waters running into Little river from those running into the Tennessee, strikes the Holston; and extend the line from thence to Clinch river; and again from the ridge to the Chilhowee mountain, paying strict regard to the treaty.

In their report, the 30th November ensuing, the commissioners say, that "the commissioners on the part of the Cherokees did not attend; and we proceeded to examine with great attention for the ridge which divides the waters of the Tennessee from those of Little river, and tracing it, found it a plain leading ridge, and that it struck the Holston at the mouth; but, having heard it suggested, that the Indians had in contemplation, at the time the treaty was made, a ridge which they supposed would strike the Holston higher up, we did not content ourselves, but retraced the ridge, and examined well the south bank of the Holston, and the result was, that we were perfectly convinced, that the ridge which divides the waters of Tennessee and Little river, strikes the Holston at the mouth, and at no other part. We then proceeded to run, but not to mark, a line of experiment, from the point of the ridge, in a south-east direction, to the Chilhowee mountain, distance seventeen and a half miles, and again from thence to the Clinch, in a north-west direction, distance nine miles, and *found that line, continued to the south-east, would intersect the Tennessee, shortly [*7 after it crossed the Chilhowee mountain, consequently, take away all the Indian towns lying along the south side of the Tennessee. This showed the necessity of turning the direction more to the east and west; and it is our opinion, that a line extended from the point of the ridge aforesaid, south sixty degrees east, to Chilhowee mountain, again from the point, north sixty degrees west, will form the true line from Chilhowee mountain to Clinch, between the United States and the Cherokees, according to the treaty of Holston. The more fully to elucidate this report, we present you with a map, which we believe is nearly correct, on which both the lines are laid down." This line left several white settlers within the Indian lands.

In transmitting this report to the war department, Governor Blount remarks, "As the geography of the country generally cannot be known to you, there being no correct map of it, I think it necessary to inform you, that the country to the east or rather south-east of Chilhowee mountain, through which the line reported upon, if continued beyond it, will pass, for fifty or sixty miles, is an entire bed, or ledge after ledge, of mountains, that is, until it intersects the line which is to be extended south from the north boundary of North Carolina, near which no settlements can be formed;

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hence, I conclude, it will not be essential to extend it. That which the line reported on will intersect, if continued, meaning that which runs south from the north boundary of North Carolina, I caused to be run, and marked, about sixty miles from the mouth of McNamee's creek to Rutherford's war trace, by Mr. Joseph Harden, in the course of last winter. Harden did not run north, as required by the treaty of Holston, but south, according to the treaty of Hopewell." The writer then states certain parts of the line, which, in his opinion, need not be run.

In a letter from Governor Blount to the secretary of war (1 American State Papers, Indian Affairs, 629), dated July 15th, 1791, in reference to the treaty of Holston, concluded the 2d of the same month, he says, "According to my instructions, I proposed that the ridge dividing the waters of Tennessee from those of Little river should form a part of the boundary; but the Indians would not agree to it, but insisted on a straight line which should cross the Holston where that ridge should strike it; and were so firmly fixed in their determination, that I could not prevail on them to agree to any other." And in another letter from Governor Blount to the secretary (same page), dated 2d March 1792, he says, "I can't help remarking, that I proposed at the treaty that the ridge should be the line. You will recollect, that I was so instructed; and the chiefs were unanimously opposed to it, saying it should be a straight line; and that it was an evidence that my heart was not straight, that I wanted a crooked line. The difficulty will be, in running the line, to ascertain where the ridge that divides the waters of Little river and Tennessee will strike the Holston; for,

*8] it seems, the white people *cannot agree upon it—a circumstance unknown to me at the time the Indians proposed it; but from the best information I can obtain, I am induced to believe, it will prove to be lower down than they expected; and in that case, it is my opinion, that the words of the treaty ought not to be so strictly adhered to as to give them any great degree of dissatisfaction." In his answer of 22d April 1792, the secretary of war says, "I am commanded by the president of the United States, to whom your letters are constantly submitted, to say, with respect to your remarks upon the line at Little river, that you will be pleased to make a liberal construction of that article, so as to render it entirely satisfactory to the Indians, and at the same time as consistently as may be with the treaty."

On the 2d October 1798, the treaty of Tellico was entered into, which contained the following preamble: "Whereas, the treaty made and concluded on Holston river, on the 2d of July 1791, between the United States and the Cherokee nation of Indians, had not been carried into execution for some time thereafter, by reason of some misunderstanding which had arisen; and whereas, in order to remove such misunderstanding, and to provide for carrying the said treaty into effect, and for re-establishing more fully the peace and friendship between the parties, another treaty was held, made and concluded, by and between them, at Philadelphia, the 26th of June 1794; in which, among other things, it was stipulated, that the boundaries mentioned in the fourth article of the said treaty of Holston should be actually ascertained and marked, in the manner prescribed by the said article, whenever the Cherokee nation should have ninety days' notice of the time and place at which the commissioners of the United States intended to commence their

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operations: and whereas, further delays in carrying the said fourth article into complete effect did take place, so that the boundaries mentioned and described were not regularly ascertained and marked, until the latter part of the year 1797; before which time, and for want of knowing the direct course of said boundary, divers settlements were made by citizens of the United States upon the Indian lands, over and beyond the boundaries so mentioned and described in the said article, and contrary to the intention of the said treaties; but which settlers were removed from the said Indian lands, by authority of the United States, as soon after the boundaries had been so lawfully ascertained and marked as the nature of the case had admitted."

The fourth article declares, "In acknowledgment for the protection of the United States, and for the considerations hereafter expressed and contained, the Cherokee nation agrees, and does hereby relinquish and cede to the United States, all the lands within the following points and lines, viz: from a point on the Tennessee river, below Tellico block-house, called the Wildeat Rock, in a direct line to the Militia Spring, near the Maryville road, leading from Tellico. From the said spring to the Chilhowee mountain, by a line so to be run as will leave all the farms on Nine-mile creek to the northward and eastward of it; and to be continued along Chilhowee mountain *until it strikes Hawkins's line. Thence, along the said line, to the [9
Great Iron mountain; and from the top of which a line to be continued in a south-easterly course, to where the most southerly branch of the Little river crosses the divisional line to Tugalo river; and from the place of beginning, at the Wildeat Rock, down to the north-east margin of the Tennessee river (not including islands), to a point or place one mile above the junction of that river with the Clinch; and from thence, by a line to be drawn in a right angle, until it intersects Hawkins's line leading from Clinch; thence, down the said line, to the river Clinch; thence, up the said river, to its junction with Emmerly's river; and thence, up Emmerly's river, to the foot of Cumberland mountain, &c." The 5th article provided, that this line should be run and marked under the superintendence of commissioners appointed by both parties; and that maps should be made, one of which was to be deposited in the war-office.

The Indian boundary established by the treaty of Holston calls for certain lines and natural objects, which, it would seem, give as much certainty to a boundary as could well be given, short of a marked line or water-course. It was to begin at the top of the Currahee mountain, where the Creek line passes it. This mountain is in the state of Georgia, and is designated on the maps of that state; and "where the Creek line passes it," is easily ascertained. From this point, the line was to run direct to Tugalo river, an object well known, and marked on the maps; thence north-east to the Occunna mountain, and over the same, along the South Carolina Indian boundary, to the North Carolina boundary. This mountain is designated on the map, and the boundaries called for, being established, were known. From the North Carolina southern boundary, the line was to run north, to a point, from which a line is to be extended to the river Clinch, that shall pass the Holston, at the ridge which divides the waters running into Little river from those running into the Tennessee. The point at which the line shall strike the Holston, at the ridge, not being certain, gave rise to some contro-

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versy, shortly after the date of the treaty. The commissioners appointed to run the line in 1792, found that by tracing the ridge, it led to the junction of the Holston and Tennessee rivers; and consequently, if the termination of the ridge was the place, within the meaning of the treaty, where the line should cross, it must cross the Holston at its mouth. But that this was not the construction given to the treaty by the parties to it, is clear, from the letters of Governor Blount, who negotiated it, to the secretary of war. The same day the treaty was concluded, he writes: "I have concluded a treaty which includes all the white settlers, except those south of the ridge dividing the waters of Little river from those of Tennessee." And again, July 15th, 1791, he says, "I proposed that the ridge dividing the waters of Tennessee from those of Little river should form a part of the boundary; but the Indians would not agree to it; and were so firmly fixed in their determination, that I *could not prevail on them to agree to any other.

*10] This line is not so limited, as to the point at which it shall leave the north line, or at which it shall strike the Clinch, but that it may be so run as either to include or leave out the settlers south of the ridge; the only stipulations respecting it are, that it shall cross the Holston, at the ridge." And again, in a letter of 2d March 1792, "I can't help remarking, that I proposed at the treaty that the ridge should be the line. You will recollect, that I was so instructed, and the chiefs were unanimously opposed to it, saying it should be a straight line." And he says, that "the ridge will strike the Holston lower down than was expected; and in that case, it is my opinion, that the words of the treaty ought not to be so strictly adhered to, as to give them any great degree of dissatisfaction." In his answer, the secretary of war says, by command of the president, "You will make a liberal construction of that article, so as to render it entirely satisfactory to the Indians." The Indians remonstrated, and required the white settlers south of the ridge to be removed.

In the talk of the president, dated 27th August 1798, to the Cherokees, which was sent to them, preparatory to the treaty of Tellico, he says, it was expected, that the Holston treaty line would have included a great proportion of the frontier white settlers, but it proved otherwise, when the line was run. The words, "shall pass the Holston at the ridge which divides the waters running into Little river from those running into the Tennessee," do not necessarily imply that the line shall cross the Holston, at the point where the ridge terminates. Little river falls into the Holston, and the general course of the ridge would strike the Holston, some distance above its mouth. And when we consider that the Indians refused to make the ridge the boundary, and would agree to no other than a straight line; and that neither party seems to have considered the place of crossing, at the mouth of Holston, we think, in the language of the president, through the secretary of war, "that a liberal construction of this clause of the treaty should be given."

But it is unnecessary to consider the correspondence of Governor Blount, the report of the commissioners of 1792, or the words of this article of the treaty, with the view to give to it a satisfactory construction; as the parties in the treaty near Tellico have given to it a practical construction. In this treaty, the parties say, that for certain causes enumerated, the boundaries mentioned and described in the fourth article of the treaty of Holston,

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"were not regularly ascertained and marked, until the latter part of the year 1797. The second article provides, that the treaty subsisting between the present contracting parties, are acknowledged to be of full and operating force; together with the construction and usage under their respective articles, and so to continue. And in the third article, it is declared, that the limits and boundaries of the Cherokee nation, as stipulated and marked by the existing treaties between the parties, shall be and remain the same, where not altered by the present treaty. *The object of the government in entering into this treaty was, to purchase the Indian territory, into which white settlers had intruded, at and near Nine Mile creek, and perhaps other places. The line established was run and marked, and we have the original map, or a copy of the survey, before us, which was returned to the war department. [*11

That this purchase was of territory not included in the boundaries of the Holston treaty, will not be disputed. And from the language of the third article, it is clear, that the parties did not intend to establish an entirely new boundary, but to make such alterations of the Holston boundary as should secure the object of the United States. The land lying south-west of the Holston boundary belonged to the Indians; and it was a part of this land that was purchased by the treaty of Tellico. Of course, this purchase extended from the Holston treaty line southerly; for no one can suppose, that a strip of Indian land would be left between the treaty lines of Holston and Tellico. The facts go clearly to show, that the Tellico purchase was up to the Holston line, and that the part of that line to which the purchase did not extend, was designated; and the point where the Tellico line varied from it, so as to include the lands purchased, is marked on the map. And this shows the propriety of the language used in the third article of the Tellico treaty; that "the boundaries should remain the same as established by existing treaties, where not altered by the present treaty."

The line of this treaty was to begin "at the Wildcat Rock, in a direct line to the Militia Spring, near the Maryville road, leading from Tellico. From the said spring, to the Chilhowee mountain, by a line so to be run as will leave all the farms on Nine Mile creek to the northward and eastward of it; and to be continued along Chilhowee mountain until it strikes Hawkins's line." This line is laid down on the map, and although it is not called the southern boundary of the Holston treaty, yet it is recognised as the northern boundary of the territory purchased; and consequently, must be the Holston boundary. Hawkins's line extends from Clinch, crossing the Holston, some miles above its mouth, and runs between the waters of Little river and those of the Tennessee, as appears from the map, and continues until it reaches the summit of the Great Iron mountain. At this point, a monument is erected; but if the line was extended beyond this, easterly, it was not, probably, marked; and it is not laid down on the plat. It is probable, that the original survey of this line was destroyed, when the war-office was burnt, in 1800.

From the Wildcat Rock, the Tellico treaty calls "to run down the north-east margin of the Tennessee river, to a point or place one mile above the junction of that river with the Clinch; and from thence, by a line to be drawn in a right angle until it intersects Hawkins's line leading from

Clinch." Here is another recognition of this line as the northern boundary of the Indian lands ; and consequently, the line established by the Holston *12] treaty. *And the Tellico treaty calls again, after striking Hawkins's line, by running near Nine Mile creek, and along Chilhowee mountain, to run with it to the top of the Great Iron mountain. From this point, the new treaty line varies from a direct course, and continues "south-easterly to where the most south-easterly branch of Little river crosses the divisional line to Tugalo river."

It is only necessary to compare the course and objects here designated with the south-eastern calls of the Holston treaty line, to see, that the Tellico line includes a large tract of country not included by the Holston line. The Holston line, after striking the Tugalo river, runs north-east to the Occunna mountain, and over the same, along the South Carolina Indian boundary, continuing a north-easterly direction, until it strikes the North Carolina boundary ; thence north to a point which shall intersect a line to be extended from the river Clinch, that shall pass the Holston at the ridge ; the Tellico line runs south-easterly, until it strikes the divisional line to Tugalo river. The Holston line calls to run along this divisional line, north-easterly ; so that from this point these lines diverge until the Holston line shall reach the point of connection with the line drawn from the Clinch. These boundaries, from the point of intersection on the top of the Great Iron mountain, to the point of intersection on the South Carolina Indian boundary, include a large tract of country. And this tract, with the one designated by Hawkins's line, the Tennessee Nine Mile creek, and the Clinch, &c., constituted the territory purchased by the Tellico treaty.

This recognition of Hawkins's line as the Indian boundary, was in 1798, only eight years after the boundary was established by the treaty of Holston, and one year after the line is declared to have been run and marked. The facts in regard to this line were recent, and of course, fresh in the recollection of the contracting parties. It was a matter about which they could not be mistaken. They say the Holston line was not run and marked until the latter part of the year 1797, and the United States purchase the Indian lands up to Hawkins's line. It is true, this line is not, in terms, said to be the boundary established by the Holston treaty, but in the most solemn form, it is recognised to be the boundary of the Indian lands, by purchasing those lands up to it ; and by tracing it as the boundary, beyond the purchase on Nine Mile creek, to the top of the Great Iron mountain. It could then be no other than the Holston treaty line, for in that part of the country, there was no other Indian boundary, before the treaty of Tellico. Whatever doubt may have existed as to Hawkins's line being the true Indian boundary, independently of this treaty, there would seem to be no ground for doubt, under the recognitions of that line, in this treaty.

It is contended, that the Holston line should run from the Clinch, crossing the Holston river at its mouth, and continue on, in the same direction, *13] until it shall strike the North Carolina boundary. *This would not only disregard the solemn acts and recognitions of the parties to the Holston treaty, in forming the treaty of Tellico ; but it would also disregard the language of the former treaty. It calls for a line running north, from North Carolina boundary, to a point that shall intersect a line drawn from the Clinch, crossing the Holston at the ridge. This call to run north,

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by this construction, is wholly disregarded. And on what ground, is this construction attempted to be maintained? The answer must be, simply on the call for the line to cross the Holston river at the ridge. A call, in itself, somewhat indefinite, and which was never construed by the Indians to mean the mouth of the Holston; nor was such a construction insisted on by the United States, either at the time the treaty was concluded, or afterwards.

The Hopewell treaty line, in running a southerly course, strikes the northern boundary of North Carolina, near Nalichuchey, and extends south to the North Carolina line, and thence to the South Carolina Indian boundary. From a point in the Hopewell line, near where it strikes the southern boundary of North Carolina, a line seems to have been run by General Pickens, north seventy-six west, to the state road leading from Ashville to Clayton, in Georgia. But this line has no connection with any other, and does not appear to have been regarded, either by the United States or the Indians, as any part of the line established by the Holston treaty. It was certainly not run agreeable to the treaty.

The evidence establishes, very satisfactorily, that Hawkins's line, so far as it goes, is the boundary of the Holston treaty; and it is very clear, from the language of the treaty, that from the Clinch, crossing the Holston river at the ridge, to the point at which this line will intersect a line run north from the southern boundary of North Carolina, a straight line was intended. Of this, no doubt can exist; and it is only necessary to extend Hawkins's line from the top of the Great Iron mountain, eastward, to the point where it shall intersect a line run north from the place where the South Carolina Indian boundary strikes the southern boundary of North Carolina. This, we feel authorized to say, from the evidence before us, constitutes the boundary of the Holston treaty.

It is argued, that it was not in the power of the United States and the Cherokee nation, by the treaty of Tellico, in 1798, to vary in any degree the treaty line of Holston; so as to affect private rights, or the rights of North Carolina. The answer to this is, that the Tellico treaty does not purport to alter the boundary of the Holston treaty, but by the acts of the parties, this boundary is recognised. Not that a new boundary was substituted, but that the old one was substantially designated. Will any one deny, that the parties to the treaty are competent to determine any dispute respecting its limits. In what mode can a controversy of this nature be so satisfactorily determined as by the contracting parties. If their language in the treaty be wholly indefinite, *or the natural objects called for [*14 are uncertain or contradictory, there is no power but that which formed the treaty which can remedy such defects. And it is a sound principle of national law, and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional powers, neither the rights of a state, nor those of an individual, can be interposed. We think it was in the due exercise of the powers of the executive and the Cherokee nation, in concluding the treaty of Tellico, to recognise in terms, or by acts, the boundary of the Holston treaty.

It is agreed, that if Hawkins's line shall be extended as the Holston

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treaty line, the land in controversy lies within the Indian country. And we are now to consider, whether, in this view, the entry and patent are void. The Indian title being only a right of occupancy, the state of North Carolina had the power to grant the fee in the lands, subject to this right. The land was entered in 1795, and patented the 20th July 1796. By the fifth section of the act of North Carolina, for opening the land-office for the redemption of specie and other certificates, and discharging the arrears due to the army, passed in 1783, it is provided, "that the Cherokee Indians shall enjoy all the lands lying within certain bounds for ever." And the sixth section provides, "that no person shall enter and survey any lands within the bounds set apart for the said Cherokee Indians, under the penalty of fifty pounds specie, for every such entry so made, to be recovered in any court of law in this state, &c.; and all such entries and grants thereupon, if any should be made, shall be utterly void." In 1784 (North Carolina Laws 482, ch. 14), the above act was amended, by authorizing the appointment of three surveyors, viz: "One to survey those lands that lie between the bounds hereafter described for the surveyor of Green county, and Cumberland mountain; one to survey the lands that lie between the Cumberland mountain and the river Tennessee; and one to survey the lands that lie between the Tennessee and the Mississippi river." The boundaries here described cover the land reserved, by the act of 1783, for the Cherokee Indians; but there is no express repeal of the fifth and sixth sections of that act; and as the act of 1784 can operate upon lands not reserved in the above sections, they cannot be held to have been repealed by implication. The supreme court of North Carolina has decided, in several cases, that the above sections remained in force; and that the entries and grants made for lands within the territory described, before the Indian title was extinguished, were void. 1 Murp. 162, 164; Conf. Rep. 434; 2 N. Car. Law Repos. 451; 3 Hawks 163.

We come now to examine the exceptions of the plaintiffs in the circuit court; and having considered and decided the controverted points, it will not be necessary to examine the exceptions in detail. *The first
 *15] exception was to the refusal of the court to instruct the jury that the sixth section in the above act of 1783, had been repealed: and we think the court did not err in refusing to give the instruction. The second instruction asked was, "that the treaty line of Holston ought to run with the South Carolina Indian boundary, called for in the treaty of Hopewell, made on the 28th of November 1786, until it should reach the termination of the line described in that treaty, running from the North Carolina boundary to the South Carolina Indian boundary; and on reaching that line, should then run with the same, reversed, to the North Carolina boundary;" which instruction was not given.

Some doubt arises from the structure of this instruction, whether the reversed line referred to is the Hopewell treaty line, or the South Carolina Indian boundary. From the maps, the latter line strikes the southern boundary of North Carolina, and from the language of the Holston treaty, this fact seems to have been within the knowledge of the parties. The call is to run "along the South Carolina Indian boundary, to the North Carolina boundary." In the Hopewell treaty line, the southern boundary of North Carolina is not named, but the northern; from which the line runs to the

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South Carolina Indian boundary. Now, the instruction must have referred to the southern boundary of North Carolina; and if the Indian boundary strikes this line, it is difficult to perceive, what application to the facts the instruction would have. But if the instruction referred to the Hopewell treaty line, it was not called for in the Holston treaty; and under the circumstances of the case, we are not prepared to say that there was error in refusing to give the instruction.

And we think there was no error in refusing to give the third, fourth and fifth instructions prayed by the plaintiffs' counsel. Nor do we perceive any error of which the plaintiffs can complain, in the first, second, third, fourth, fifth and sixth instructions given by the circuit court, on the prayer of the defendant. The judgment of the circuit court is affirmed.

TANEY, Ch. J.—I agree with the majority of the court in affirming these judgments; but I dissent from some of the principles upon which they have founded their opinion. The court (as I understand the opinion) consider Hawkins's line to be the established boundary line of the treaty of Holston; they think it is recognised as such in the subsequent treaty of Tellico; and that being thus recognised by the political department of the government, the court (according to the principles deduced in *Garcia v. Lee*, and *Foster v. Neilson*) must also regard it as the true boundary line; and must treat it as such, from the date of the treaty of Holston, in any question of property that may come before them.

If the legislative or executive departments of the government, by *any clear and unequivocal act, had declared Hawkins's line to be the true line of the treaty of Holston, I should concur with the [16 majority of this court. But I do not find any act of that description by any department of the government. In the cases of *Foster v. Neilson*, and of *Garcia v. Lee*, an act of congress had been passed, describing particularly the boundary line therein mentioned, and declaring it to be the true line of that treaty. But in this case, we have no act of the legislative or executive departments of the government, recognising the line run by Hawkins as the treaty line. It is true, that in the subsequent treaty of Tellico, the parties, in describing the boundaries of this new treaty, call, upon two occasions, for Hawkins's line, and upon both of them, run some distance with it. But there is no expression in this treaty which recognises the line thus called for as the boundary line of the treaty of Holston. It is mentioned and referred to, merely as a known point, like other places called for in this treaty; and the lines spoken of, are run, merely as known lines. But so far from declaring it to be the boundary line described in the treaty of Holston, the treaty of Tellico does not even say, that it was run by Hawkins as the boundary; nor is it described to have any connection whatever with the treaty of Holston. It is called for as a line, known in the country, and which, on some occasion or other, had been run by Hawkins; but when run, or for what purpose, cannot be gathered from any expressions in the treaty of Tellico. We know, indeed, from public historical documents, that Hawkins's line is one of the many efforts that were made to fix a certain boundary between North Carolina and the Cherokee Indians, from the vague and imperfect descriptions contained in the treaty of Holston. Other lines were run for this purpose, besides that of Hawkins. And we have no evidence that

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Hawkins's line, or any other line, was ever acknowledged, either by the Cherokees or the United States, as the correct one, unless the expressions in the treaty of Tellico are deemed to be sufficient for that purpose. The treaty of Holston was made in 1791; the treaty of Tellico in 1798; and the last-mentioned treaty recites, that delays had taken place in carrying the former into effect, so that the boundaries were not regularly ascertained and marked, until the latter part of the year 1797. But the treaty of Tellico gives no description of the marks or of the boundaries thus ascertained; nor does it state by whom the lines were run, or the boundaries ascertained and marked. I cannot think, that this recital, and the calls before mentioned for Hawkins's line, are sufficient, of themselves, to establish as a matter of law, that this line is the true boundary of the treaty of Holston; and I must dissent from that part of the opinion of the court which holds that doctrine. At the trial of this case in the circuit court, the jury were instructed, "that the treaty of Tellico is an admission by the parties that the line of the treaty of Holston has been ascertained and marked, and furnishes strong evidence that the lands reserved to the Cherokees by the treaty of Tellico were reserved by the treaty of Holston, but does not establish *the lines *17] of Pickens and Hawkins, if erroneous in fact." I concur entirely in this opinion of the circuit court; and as I perceive nothing in the other instructions of that court, as stated in the exception, of which the plaintiff has a right to complain, I agree with a majority of my brethren, in affirming its judgment.

WAYNE, Justice, dissented.

CATRON, Justice.---I think the treaty of Tellico did not settle the line of the treaty of Holston, from the Holston river to the top of the Iron mountain; and certainly, not east of the Iron mountain. So that it must now be extended in a direct course, and as a unit, to the line of intersection, running north from the North Carolina line. The land in controversy was granted before Hawkins's line was run; and which was not marked in execution of the treaty of Holston; no one pretends it was; the Indians were not present, which was indispensable to give binding validity to the line.

To say it was conclusive on one of the contracting parties, the United States, and void as to the other, the Cherokees, at the time it was run and marked, would be a most harsh assumption in regard to those who acquired titles before it was run; admitting, that the contracting parties had the power afterwards to settle its position, but which they never saw proper to do. The truth is not open to question, that the Holston treaty line never was ascertained south-east of the Iron mountain; and with due deference to the opinion of others, I think, not west of it, in execution of, and in conformity to, the treaty. Why Hawkins's line was run, the history of our relations with the Cherokees does not, with any distinctness show. From personal position, I happen to know, through those who lived at that date, and by reputation, that it was run to fix some line, beyond which it was intended, the white population should not be permitted to encroach, further than they had done at the time the line was marked, extending to a few settlers on Nine Mile creek. But that Hawkins's line was run as a conclusive boundary, in execution of the treaty of Holston of 1791, or for any further purpose than to hold the whites in check, for the sake of peace and

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convenience, it is impossible to affirm, as a matter of history ; and as such it must be affirmed, there not being any evidence in this cause.

I repeat, the land in controversy was granted before this line was run ; Hawkins ceased running, far west of where the land is situated ; on the east a line was run and marked by Pickens, which, when marked, was as authentic as that marked by Hawkins, for anything we know ; the object of each line, no doubt, was the same ; neither concluding the Cherokees, previous to the treaty of Tellico ; which treaty superseded the necessity of ascertaining and marking the true line of the treaty of Holston, from the point east, from where Hawkins ceased running. From this point (the top of the Iron mountain), it continues a line not fixed by the contracting parties ; [*18 *and the United States and Cherokees having ceased to have any interest in its ascertainment, after the treaty of the Tellico was made, North Carolina had the right to ascertain and settle it for herself, according to some one construction of the treaty of 1791 ; and by which her grantees should be bound, if so settled : or, she may have recognised Pickens's as the true line of the treaty ; if so, I think the state and her grantees bound by the recognition : so this court held in *Patterson v. Jenks*, 2 Peters 216, in a similar case ; and for reasons manifestly just. Truly, Pickens's line must be proved to be in conformity to some one construction of the treaty ; and that it is in conformity to the most favorable construction for North Carolina, there can be little doubt. To extend Hawkins's line eastwardly, as the true boundary of the treaty of Holston, will manifestly tend to disturb titles made in reference to another line ; as it will (when extended) split Buncombe county, long settled, almost in the centre. I do not, therefore, find myself capable of concurring with the majority of the court in its extension.

Again, if North Carolina has construed this treaty, and for herself settled this boundary, by her subsequent acts manifesting her understanding of it, I should not hesitate to adopt that construction, unless in violation of the plain terms of the treaty : I use the language holden by this court in *Patterson v. Jenks*, 2 Pet. 231. But the misfortune is, the bill of exceptions sets forth not a single fact ; and the correctness of the instructions of the court below cannot, therefore, be tested by the evidence given on the trial ; whether they are right or wrong, it is impossible for me to say ; they may have been mere abstractions, especially, as to the main fact, whether or not North Carolina had, by her acts, fixed a boundary for herself, be it Pickens's line or another. It follows, I feel bound to concur with a majority of the court, in affirming the judgment, on the presumption that the instructions were proper.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of North Carolina, and was argued by counsel : On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*The PRESIDENT AND DIRECTORS of the BANK of the METROPOLIS,
Plaintiff in error, v. ERASTUS GUTTSCHLICK, Defendant in error.

*Jeofails.—Pleading.—Deed of trust.—Contract of corporation.
Evidence.*

Action on an agreement in writing, by which Gutschlick had purchased a lot of ground in the city of Washington, from the Bank of the Metropolis, for which he had paid a part of the purchase-money, and given a note for the residue; by the contract, the Bank of the Metropolis, through its president and cashier, was pledged to convey the lot in fee-simple to Gutschlick, when the whole purchase-money was paid. The declaration, in each count, averred the payment of the note, and the failure of the bank to convey; to the three special counts in the declaration, there was no conclusion; to the fourth count, for money had and received, there was a general conclusion. It was held by the court, that whatever might have been the effect of the want of a conclusion to the three counts, upon a special demurrer, the 32d section of the judiciary act of 1789, would cure the defect, if admitted to be one.

A corporation may be bound by contracts, not executed under their common seal, and by the acts of its officers, in the course of their official duties; when, in a declaration, it is averred, that a bank, by its officers, agreed to a certain contract, this averment imports everything to make the contract binding.

An allegation that a party made, accepted, indorsed or delivered a bill of exchange, is sufficient, although the defendant did not do either of those acts himself; provided, he authorized the doing of them.

The averments in a declaration set forth, that the plaintiff had been turned out of possession of a lot of ground, but did not state that the eviction was by due course of law; the breach alleged in the count was, that the defendant had refused, on demand, to convey the lot. The court held the averment of eviction to be mere surplusage.

The Bank of the Metropolis contracted to deliver a title in fee-simple to Gutschlick, of a lot of ground, and at the term of the contract, they held the lot, by virtue of a sale made under a deed of trust, at which sale they became the purchasers of the property; the same lot had, by a deed of trust executed by the same person, been previously conveyed to another person, to indemnify an indorser of his notes, and it was, by the trustee, afterwards, and after the contract with Gutschlick, sold and purchased by another: *Held*, that at the time of the contract of the bank, they had not a fee-simple in the lot, which could be conveyed to Gutschlick.

In case of a deed of trust, executed to secure a debt, unless in case of some extrinsic matter of equity, a court of equity never interferes to delay or prevent a sale, according to the terms of the trust; the only right of the grantor in the deed, is the right to any surplus which may remain of the money for which the property sold.

The action, in this case, was *assumpsit* against the bank, on a contract under the seals of the president and cashier: *Held*, that the action was well brought; it makes no difference, in an action of *assumpsit* against a corporation, whether the agent was appointed under the seal or not; nor whether he puts his own seal to a contract which he makes in behalf of the corporation.

It is admissible, for the party who sues on a contract, to make a title to a lot of ground in fee-simple which he had purchased, to give in evidence, an examination of the records of the office for the recording of deeds, by a witness who was searching into the title of the lot, and also a letter, giving to the party who made the contract, a notice that the lot was about to be sold, under a title superior to that under which he held. A deed from the vendor, informally executed, and which did not convey the title the vendor agreed to give, was also admissible in evidence, in an action against the vendor, on the contract.

A paper executed by the president and cashier of a bank, purporting to convey a lot of ground held by the bank, is not the deed of the corporation.

The proceedings in an action against the indorser of a note, by the holder, which gave to a trustee, by the terms of the deed of trust, a right to sell property held for the indemnity of the indorser, were proper evidence, in an action on a contract for the sale of the lot, from which

*20] the party, who had purchased under another title, had been evicted by a title *obtained under the deed of trust. No exceptions to the regularity of the proceedings offered

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in evidence can be taken, which should have been properly made in the original action, by the party sued on the same.

Whether evidence be admissible or not, is a question for the court to decide; but whether it be sufficient or not to support the issue, is a question for the jury. The only case in which the court can make inferences from evidence, and pass upon its sufficiency, is on a demurrer to evidence.

When a trust is created for the benefit of a third party, though without his knowledge at the time, he may affirm the trust, and enforce its execution.

Where a deed of trust was executed to secure the payment of certain notes, and a judgment obtained on the notes, the judgment did not operate as an extinguishment of the right of the holders of the note, to call for the execution of the trust; although the act of limitations might apply to the judgment.¹

Guttschlick v. Bank of the Metropolis, 5 Cr. C. C. 435, affirmed.

ERROR to the Circuit Court of the District of Columbia and county of Washington. This action was instituted by the defendant in error, against the plaintiff in error, on the 31st day of March 1836. The declaration contained four counts:

1. That on the 9th of November 1827, the plaintiff bought of defendant, a certain lot of ground in the city of Washington, being lot No. 5, square No. 489, for the sum of \$1191.25, and paid the sum of \$591.25, and gave his promissory note for the balance of the purchase-money; that the defendant, in consideration thereof, agreed, through the president and cashier, that it was pledged, when the note should be paid, to convey said lot to plaintiff, his heirs and assigns; that said note was paid at maturity, with the interest: yet the defendant had not conveyed said lot, but to do so had hitherto wholly refused, &c.

2. That whereas, the defendant, by John P. Van Ness, the president of said bank, and Alexander Kerr, the cashier, agents for that purpose, duly authorized by, and acting for, defendant, did, on the 9th November 1827, bargain and sell to the plaintiff, the said lot of ground, on the terms mentioned in the first count, and did thereupon put plaintiff in possession of said lot; and the plaintiff averred the authority of Van Ness and Kerr to make said agreement; that plaintiff paid the note, and received and continued in possession of the lot, and was obliged to pay, and did pay, taxes thereon, from the 9th November 1827, to 30th December 1835, when he was turned out of possession by the Patriotic Bank: yet defendant, although often requested, had not conveyed the said lot in fee-simple to the plaintiff, but had hitherto wholly neglected and refused.

3. That whereas, defendant, on the 9th November 1827, by an agreement of that date, acknowledged to have received from the plaintiff the sum of \$591.25, and the promissory note of the plaintiff, payable six months after date, with interest, and in consideration thereof, put the plaintiff in possession of said lot, and undertook and faithfully *promised the [*21 plaintiff, upon the payment of said note, with interest, to convey to plaintiff said lot in fee-simple; that the plaintiff did pay said note, with interest, whereby defendant became liable and bound to convey said lot in fee-simple, by a good and indefeasible title, free from incumbrances; and being so liable, undertook and promised, &c.: yet plaintiff said, that the

¹ When a promissory note contains a warrant of attorney to confess judgment, the lapse of six years is not a bar to the entry of judgment

thereon. *Morris v. Hannick*, 10 Phila. 571; *Person v. Weston*, 1 Kulp (Pa.) 387; *Peirce v. McClurg*, 1 Chester Co. Rep. 241.

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defendant was not, at the time when, &c., nor at any other time after, seised or possessed of said lot in fee-simple, nor did then, or at any other time, although often requested to, convey, &c. And the plaintiff further averred, that being in possession of said lot as aforesaid, he was compelled to pay and did pay the taxes and public dues, amounting to \$300, whereby, &c.

4. The fourth count was for money had and received, and concluded as follows: "Yet the said defendants, the said sums of money have not paid to the said plaintiff, nor have they paid any part thereof, but the same, or any part thereof, to pay to the said plaintiff, have hitherto wholly neglected and refused: to the damage of the said plaintiff \$3000, and thereof," &c. There was no conclusion to the three preceding counts in the declaration.

The jury, under the charge of the court, found a general verdict for the plaintiff for \$1191.25, with interest from November 9th, 1827.

The counsel for the defendant took four exceptions to the charge of the court. The plaintiff in the circuit court having given in evidence an account made out by the Bank of the Metropolis, against him, stating that he had bought a certain lot of ground described in the same, from the bank, for the sum of \$1191.25, gives a credit for the sum of \$595.25 as "cash received;" and the balance, \$600 to be due on the bond of the plaintiff, in the following terms:

"Be it known, that on this 9th day of November 1827, Ernest Gutschlick has purchased of the Bank of the Metropolis, lot No. 5, in square No. 489, as above described, and as laid down on the plat of the city of Washington, for the sum of \$1191.25, and that he hath paid on account of the same, the sum of \$595.25, leaving due the sum of \$600, for which he hath given his note to the said bank, payable in six months after date, with interest from date, which sum of \$600 when paid, will be in full for the purchase-money of said lot. The Bank of the Metropolis, through president and cashier, is hereby pledged, when the above sum shall be paid, to convey the said lot, viz., lot 5, in square 489, in fee-simple, to the said Ernest Gutschlick, his heirs or assigns, for ever. In testimony whereof, the said
*22] president and cashier, by order of *the board of directors, have hereto set their hands and seals, this ninth day of November 1829.

JOHN P. VAN NESS, [SEAL.]

President of the Bank of Metropolis.

ALEXANDER KERR, Cashier." [SEAL.]

"In presence of—GEO. THOMAS."

With evidence that he, the plaintiff, had paid the sum of \$600 to the bank; the defendants excepted to the admissibility and competency of the same, until some evidence should be given, showing the authority of the parties who executed the same to sign said paper. The court overruled the objection.

The defendant's second bill of exceptions stated, that the plaintiff proved, that in December 1835, witness, at the instance of the plaintiff, examined the records of deeds in Washington county, for the purpose of tracing the plaintiff's title to the lot in question, and after such examination, wrote for the plaintiff, his letter to the bank, dated 17th December 1835; that when he wrote that letter, a deed, purporting to be executed by John P. Van Ness, president, etc., to the plaintiff, was before him, and was the deed referred to in said letter as having been handed to him by plaintiff. The

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said deed was duly recorded on the 13th of May 1828, and appeared to have been delivered in August 1828. Statements were made by counsel, and the plaintiff offered to read said deed in evidence; which being objected to, the court overruled the objection, and defendant excepted.

The third bill of exceptions stated, that the plaintiff, in order to maintain the issue on his part, offered in evidence, the proceedings of the circuit court of the district of Columbia, for the county of Washington, in a certain suit brought by the Patriotic Bank against Samuel Lane, for the purpose of showing, that Samuel Lane had been in fact sued upon a note for \$3000, one of the notes mentioned in the deed from B. G. Orr, to Joseph Elgar, dated 21st of August 1818; to the competency and admissibility of the same to prove the said fact, the defendant objected; but the court overruled the objection, and permitted the same to go to the jury. To the admission of which testimony the defendant, by his counsel excepted. The deed from B. G. Orr referred to in the exception, was a deed of trust, executed on the 21st day of August 1818, and duly recorded, to Joseph Elgar, by which Orr conveyed to Elgar, certain lots of ground in the city of Washington, in trust, that if Samuel Lane should be sued, or put to any cost, trouble, damage or expense, by reason of his having indorsed certain notes made by B. G. Orr, negotiable at the Patriotic Bank, the trustee should sell and dispose of the property conveyed by the same, and out of the proceeds, discharge the notes, or such as might have been substituted for them, and to indemnify the said Samuel Lane, etc.

The fourth bill of exceptions stated, that the plaintiff, to sustain the issue on his part, gave in evidence the articles of agreement, *signed by John P. Van Ness, president of the bank of the Metropolis, [*23 and Alexander Kerr, cashier of the bank, with the plaintiff, for the sale of the lot; and then, having proved that B. G. Orr was seised in fee of the premises mentioned in the agreement, gave in evidence the deed from Orr to Elgar, referred to in the third exception; and then gave in evidence a deed from B. G. Orr to Kerr, authorizing the sale of the lot, for the purpose of discharging certain notes made by Orr, and discounted at the Bank of the Metropolis, and a deed made by Kerr to the Bank of the Metropolis, in pursuance of the trust, dated July 1st, 1825, under which deed, the bank entered into possession of the lot; and then gave in evidence the proceedings in the circuit court, in the case of the Patriotic Bank against Samuel Lane, as stated in the third bill of exceptions, and proved by competent testimony, that B. G. Orr had died in 1823, and Samuel Lane, in the year 1822, both insolvent; and that in the year 1835, said Elgar, at the instance and request of said Patriotic Bank, advertised the property mentioned in said deed to him for sale, in manner following, and that pursuant to said advertisement, he did, on the 21st day of December 1835, enter on the premises and expose to sale, and did sell, said lot No. 5, in square No. 489; and the said Patriotic Bank, by its cashier, became the purchaser; and said Elgar executed to said bank a deed for the same, and that the net proceeds of said sale of said lot, was carried on the books of the said Patriotic Bank to the credit of said B. G. Orr's note for \$3000, mentioned in said deed from said Orr to Elgar, still leaving, as appears by the said books, a balance due on the said note; and then gave in evidence a letter addressed by said plaintiff to said defendant, and proved by com-

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petent testimony, that the said lot was vacant, and uninclosed and unimproved; and that after said sale and conveyance to said Patriotic Bank, the cashier of said bank went on to said premises, in company with the attorney of said bank, and then and there declared, that he took possession of the same; and that in the year 1824, the said lot was assessed on the books of the corporation of Washington, as the property of said Orr; and that from the year 1825 to the year 1828, both inclusive, the same was assessed to said defendant, who paid the taxes thereon; and that from the year 1829 to the year 1835, the same was assessed to said plaintiff, who paid the taxes thereon, and continued in possession, till the year 1835, and from that time, the same had been assessed to said Patriotic Bank; and further proved, that said plaintiff was duly notified by the cashier of said Patriotic Bank, of his intention to take possession of said lot, in the manner and at the time of his said entry as aforesaid, that that said lot still remained and has constantly remained open, vacant, unimproved and uninclosed; and further proved, that said plaintiff had paid to said defendant the whole consideration-money for which said lot was sold to him, and taken up, at maturity, as part of said purchase-money, the note mentioned in the agreement aforesaid, signed by said Van Ness and Kerr; and that *24] the said Orr and Kerr, during their lives, and *the said Elgar, the Bank of the Metropolis, and Patriotic Bank, were all in the city of Washington, from 1818 till after 1835. The defendant moved the court to instruct the jury, that upon this evidence, the plaintiff was not entitled to recover upon the first, or second, or third or fourth counts in the declaration; which instructions the court refused to give; to which refusal the defendants excepted. The defendants prosecuted this writ of error.

The case was argued by *Coxe*, for the plaintiffs in error; and by *Semmes* and *Bradley*, for the defendant.

Coxe contended, that the circuit court had erred in each and all the instructions given to the jury. He argued, that the proceedings under the deed from Orr to Elgar, under which the Patriotic Bank claimed title to the lot sold to the defendant in error, were irregular and void. Eighteen years had elapsed between the execution of the deed of trust by Orr to Elgar; and if the Patriotic Bank could come forward in 1835, to claim under a note given in 1819, they should have gone into a court of equity before they could call on the trustee to sell. The deed of trust gave only a naked power; and after the lapse of so many years, no sale could be made under it. He had exceeded his authority. Deeds of trust have the same effect as common-law mortgages. In 1835, when Elgar undertook to execute the trust, there was no debt due to the Patriotic Bank. A court of equity, as well as a court of common law, would have presumed its payment.

There is no evidence that Samuel Lane had been sued upon the notes, or had ever suffered damage, or been put to expense. The judgment of the Patriotic Bank on the notes, was obtained in 1823, against the administrator of Lane. By the law of Maryland, a judgment becomes inoperative, after twelve years; and this judgment was therefore invalid in 1835. The statute of limitations had created a complete bar to all claims on the notes of Orr, or on the judgment. The Patriotic Bank had no rights under either

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the judgments or the notes. The Bank of the Metropolis had, therefore, become entitled, completely and exclusively, under the deed to Alexander Kerr, to the lot; for if no proceedings could be had against Lane, how could the deed of trust from Orr to Elgar be put in force? No evidence could be introduced, to show the right of Elgar; it was at an end from time.

The defendant in error did not show, on the trial, a right to recover against the Bank of the Metropolis. He had no right of action. He should have shown that he had tendered a proper deed to the bank, to be executed; but this was not shown, or averred. He should have proved that a power to sell the lot had been given by the bank to the president and cashier; but the circuit court did not require this. The defendant in error was barred from suing, by his holding the *deed for the lot, although it may have been defective; and by his holding possession under the deed, [*25 until he had demanded a better one from the Bank of the Metropolis.

All the counts in the declaration are defective, except the fourth and last, as they have no conclusion; and the conclusion to the last count is inapplicable to the preceding three.

Semmes and Bradley, for the defendant in error.—It is extraordinary, that after the pleadings were made up in this case, a trial had, and the plaintiffs in error had taken four bills of exception, objections to the declaration should be first made in this court. The party thus objecting is too late; he has waived all right to take such exceptions. All defects in the declaration are cured by the verdict and by the statute of jeofails. So, if the defendant in the circuit court had an objection to the form of the action, he should have taken it by a plea.

The contract is set out in the declaration. It is a contract for the sale of the lot, by the officers of the bank; and it has been held, that the accredited agents of the bank have a right to bind it by their contracts. *Hatch v. Barr*, 1 Ohio 390. It is certain, that the Bank of the Metropolis made the contract set out in the record, and did not keep it with the defendant in error. At the time they assumed the right to sell the lot, the bank could not legally convey it; nor has a legal title to it been made, at any time, by the bank. There was an existing incumbrance on the lot, which the bank did not remove, and which has, subsequently to the sale to the defendant in error, been enforced; and he is entirely divested of the property. He has paid the full consideration stated in the contract, and he now seeks to recover the same back from the bank. This is resisted, and this is the question in the case. On the part of the defendant in error, every principle of equity and justice is in full force. The bank would exempt itself from its obligations, upon legal and technical grounds. But no objections, on such grounds, to the recovery of the defendant in error, will be found to exist. 20 Johns. 15, 20; Sugd. on Vend. 6. Incumbrances on property are objections to a valid title. 11 Johns. 525; 2 Ibid. 613; 12 Ibid. 190; 8 Wheat. 338; 12 Ibid. 64.

The authority of the agents of the bank to sell may be inferred from the acts of the parties. The money of the defendant, and his note, were given to the bank for the property, and this property was acquired by the

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bank from one of its debtors, for the payment of a debt. This is authorized by the charter.

This was a contract on the part of the bank to sell the lot, free from all incumbrances. Cited, on this point, 1 H. Bl. 270, 280 ; 3 Bos. & Pul. 162 ; 4 Esp. 221 ; 2 Esp. N. P. 639-40. Was there an outstanding legal incumbrance on the lot, superior *to the title of the Bank of the Metropolis, *26] at the time they made the sale to the defendant in error?

It must be admitted, that any one interested in the trust given to Elgar might call on him to execute it ; and if he was willing to do his duty, there was no necessity to call in the aid of a court of chancery. The Patriotic Bank was the holder of the notes indorsed by Lane ; it was the *cestui que trust*. The bank was not barred by time. Their judgment was interlocutory, and was not affected by the statute of limitations of Maryland. The object of the deed of trust was to pay the notes, and thus to indemnify the indorser. The bank had a right to avail itself of the trust, whenever it became known to them. 3 Johns. Ch. 261. The purchase of the lot by the Bank of the Metropolis was made subject to the deed of trust to Elgar. That deed was on record, and was notice, from its date, to all the world. Nothing but actual fraud can divest a mortgage, properly on record, and that fraud must be proved. Cited, the Recording Act of Maryland 1815 ; 1 Johns. Ch. 298, 394.

Another objection has been made. It is said, that although the length of time which had elapsed before the sale by Elgar, would not bar a mortgage, but it would bar a judgment. But to make a judgment a bar, the statute of limitations must be pleaded. It is not void, but may be made so by pleading the statute. There was no plea of the statute in this case.

BARBOUR, Justice, delivered the opinion of the court.—This was an action of *assumpsit* brought by the defendant in error against the plaintiff in error, in the circuit court of the United States, in the county of Washington, and district of Columbia. The declaration contains three special counts, and a count for money had and received. The three special counts are all founded upon an agreement in writing, which, after reciting that the plaintiff in the court below had bought of the defendant in the court below, lot No. 5, in square No. 489, in the city of Washington, for which he had paid a part of the purchase-money, and executed his note for the residue, contains the following stipulation : "The Bank of the Metropolis, through the president and cashier, is hereby pledged, when the above sum (that is, the amount of the note) is paid, to convey the said lot, viz., lot No. 5, in square 489, in fee-simple, to the said Ernest Guttschlick, his heirs or assigns for ever." Each of these counts avers the payment, at the time agreed, of the amount of the note, and the failure of the bank, on demand, to convey the lot. At the trial, several bills of exception were taken, and a verdict was found, and judgment rendered, in favor of the plaintiff. To reverse that judgment, this writ of error is brought.

In the argument at the bar, various objections have been urged to the sufficiency of the declaration, which we will briefly notice, in the order in which they were made. The first objection is that the special counts have no conclusion. *27] There is certainly no formal conclusion to either of these counts. Each of them, after alleging the breach, terminating

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with the words, "whereby, &c." Whether counts, thus concluding, would have been sufficient upon a special demurrer in the court below, it is not necessary to decide; because, we are clearly of opinion, that the 32d section of the judiciary act, would cure the defect, if it were admitted to have been one.

The second objection which was taken, applies to the first count, viz., that the agreement sued on, is averred to have been made by the bank, "through the president and cashier," without averring their authorization by the bank to make it. We consider this objection as wholly untenable. The averment in this count is, that the bank, through these officers, agreed to convey the lot. Now, even assuming, for the sake of giving the objection its full force, that the making of this agreement was not within the competency of these officers, as such, yet it was, unquestionably, in the power of the bank, to give authority to his own officers to do so. When, then, it is averred, that the bank, by them, agreed, this averment, in effect, imports the very thing, the supposed want of which constitutes the objection; because, upon the assumption stated, the bank could have made no agreement, but by agents having lawful authority. Nay, it would have been sufficient, in our opinion, that the bank agreed, without the words, "through the president and cashier;" for it is a rule in pleading, that facts may be stated according to their legal effect. Now, the legal effect of an agreement made by an agent for his principal, whilst the agent is acting within the scope of his authority, is, that it is the agreement of the principal. Accordingly, it is settled, that the allegation that a party made, accepted, indorsed or delivered a bill of exchange, is sufficient, although the defendant did not, in fact, do either of these acts himself, provided he authorized the doing of them. Chitty on Bills 356, and the authorities there cited. This principle has been applied, too, in actions *ex delicto*, as well as *ex contractu*. In 6 T. R. 659, it was held, that an allegation that the defendant had negligently driven his cart against plaintiff's horse, was supported by evidence, that defendant's servant drove the cart. In this aspect of the question, it was one, not of pleading, but of evidence. If, on the contrary, the act were one in their regular line of duty, then, of course, the averment was unnecessary. In the case of *Fleckner v. United States Bank*, 8 Wheat. 358, the court declare the point to be settled, "that a corporation may be bound by contracts, not authorized or executed under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers."¹

¹ In the case of the City of Tallahassee v. Newby, in the court of appeals of Florida in 1845, the following opinion, upon this question, was delivered by—

JORDAN, Justice.—In the case the Bank of Columbia v. Patterson's Administrators, 7 Cranch 299, the action was *indebitatus assumpsit* for work and labor done under a contract made with the duly authorized agents of a corporation, under their *private* seals: and it was held, that the action was well brought, the contract being made for the exclusive benefit of the corporation, which had, from time to time,

paid money to the intestate on the faith of it. In the case of *Randall v. Van Vechten*, 19 Johns. 60, a case similar in its facts to that in Cranch above cited, on its being proved that the covenantee had recognised the contract as that of the corporation, the court held the committee not liable, on the ground, that the corporation was liable in *assumpsit*. The case at bar assimilates in almost every feature to those cases. The agent or intendant, Eppes, was duly authorized to make the contract in behalf of the city of Tallahassee, and credit was given by the plaintiff to the city. But the contract

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The next objection which was raised to the declaration applied to the second count, viz., that the averment that the plaintiff was turned out of possession, was insufficient, in this, that it is not averred to have been by process of law, or by the entry of one having lawful title. If entry and eviction were the ground of the action, or constituted the gravamen of the count, as in covenant on a warranty, *or for quiet enjoyment, then, indeed, a declaration or count would be defective, which omitted to aver, that the plaintiff was evicted by due process of law, or by the entry and eviction of one, who, at the time of the covenant, had lawful title to the land; and having such title, entered and evicted the plaintiff; or which did not contain some averment of equivalent import. But upon examining the count in question, it will be found, that although this averment is contained in that count, it is mere surplusage; because the breach alleged is, that the defendant refused, on demand, to convey the land. There is nothing, therefore, in the objection, as applied to this count; because it would be good, without averring any eviction whatsoever.

The next objection to the declaration applies to the third count, and it is this: that the plaintiff, in that count, treats the agreement as importing an undertaking on the part of the bank, to convey the lot in fee-simple, by a good and indefeasible title, free from incumbrances. In the view which we have taken of this subject, it is unnecessary for us to decide, whether the agreement does, or does not, import such an undertaking, on the part

executed by the intendant was not under the corporate seal, but under his private seal, and therefore, not binding on the corporation as a deed. It was not binding on him, because it was made in the name of the corporation who received the consideration, and the plaintiff took it as the contract of the corporation. In the case of the Bank of the Metropolis v. Gutschlick, 14 Pet. 19, which was an action of *assumpsit* against the bank, upon an agreement in writing, signed by the president and cashier, under their private seals, the declaration contained three special counts, all founded on the agreement, and a count for money had and received, it was held, that the action was well brought, and that it makes no difference in an action of *assumpsit* against a corporation, whether the agent was appointed under the corporate seal or not, or if he puts his private seal to a contract which he makes in behalf of the corporation. In the case of Fleckner v. United States Bank, 8 Wheat. 358, the court declared the point to be settled, that a corporation may be bound by contracts not authorized or executed under its corporate seal, and by contracts made in the ordinary discharge of the official duties of its agents and officers.

The only question presented by the exception taken in the court below, in the present case, is whether the court below erred in permitting the plaintiff to read the agreement under the private seal of Eppes, the intendant, in evidence

under the declaration. But the record presents another question which it is proper the court should determine. It is, whether the plaintiff as assignee or holder of this agreement, declared on in the first count, can maintain this action against the defendant. We are of opinion, that he can, under the act of 1828, entitled "an act regulating judicial proceedings" (Compilation 96). For, by the 33d and 34th sections of the act, "the assignment or indorsement of any bond, note, covenant, deed, bill of exchange, or other writing, whereby money is promised or secured to be paid, shall vest the assignee or indorsee thereof with the same rights, powers and capacities as might have been possessed by the indorser." We think that the assignment or indorsement of the instrument declared on, under this statute, substitutes the assignee or indorsee in place of the payee, and invests him with the rights and remedies which originally attached to the assignor or indorser, under the contract. Under the decisions in 7 Cranch 299; 19 Johns. 60; 14 Pet. 19; 8 Wheat. 358, and under our statute of 1828, §§ 33, 34, we think the agreement was competent testimony against the corporation, and being payable to bearer, it was evidence of money due the plaintiff and that the court committed no error in permitting it to be read in evidence, under this declaration. We therefore affirm the judgment rendered in the court below, with costs.

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of the bank, as is ascribed to it in this count of the declaration. This count contains an averment, that the bank was not, at the time of the agreement, or at any time after, seised or possessed of the lot in fee-simple. We have seen, that the language of the agreement is, that the bank was to convey the lot in fee-simple, to the defendant in error, his heirs or assigns for ever. Now, it appears from the record, that the bank claimed under a deed from Alexander Kerr, who sold the lot as trustee, under a deed of trust from Orr, the former owner, made to secure certain debts therein stated, which deed of trust was executed on the 8th of September 1819. But Orr had, previously, to wit, on the 6th of August 1818, conveyed the same lot, in fee-simple, to Joseph Elgar, as trustee, for the purpose of securing certain debts therein stated, and with power to sell, in certain events therein mentioned; one of which was, that Samuel Lane, who was indorser of a note of \$3000, secured by this last deed, should be sued, which event occurred as early as the year 1820. Now, from this state of facts, it is apparent, that at the date of the agreement, the bank was not seised of the fee-simple which it contracted to convey. If the deed of trust to Elgar be considered as a mortgage, then the moment it was executed, the legal estate in fee-simple was in Elgar, subject to be defeated, upon the performance of the condition, and so continued in him, from that time, down to the year 1835, when, under the trust deed, he sold and conveyed the lot to the Patriotic Bank, which purchased at the sale. The interest of the mortgagor, according to the common law, is not liable to execution as real estate. 8 East 467; 5 Bos. & Pul. 461. It is treated as equitable assets. 1 Ves. 436; 4 Kent 154. In conformity with this doctrine, this court decided (12 Pet. 201), that the wife of a mortgagor was not dowable; and in 13 Ibid. 294, that the equity of redemption could not be taken in execution under **a fieri facias*. If this be so, in the case of a mortgage, the principle applies more strongly, in case of a deed of trust, because the interest of the mortgagor, such as it is, is so far protected by a court of equity, that the mortgagee cannot foreclose, without a decree in equity; and even in that decree, a short time is allowed to the mortgagor, within which to redeem, by paying the debt; whereas, in the case of the trust, unless in case of some extrinsic matter of equity, a court of equity never interferes; and the only right of the grantor in the deed is the right to whatever surplus may remain after sale, of the money for which the property sold. There was, then, a good cause of action, on the ground, that the bank had not the fee-simple which it contracted to convey. We think, then, that the declaration is not liable to any of the objections which have been urged against it. [*29]

Nor have we any doubt, but that the action well lies against the bank. For although the agreement is under seal, it is not the seal of the corporation, but that of the president and cashier. It was decided in the case of *Randall v. Van Vechten*, 19 Johns. 60, that covenant would not lie against a corporation, on a contract not under their corporate seal; but that an action of *assumpsit* would lie; and that it makes no difference, in regard to a corporation, whether the agent is appointed under seal or not, or whether he puts his own seal to a contract which he makes in their behalf, the doctrine of merger not applying to such a case. This doctrine we approve, and it is decisive of the objection.

We come now in order to the exceptions taken at the trial. The first

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was, to the court's admitting the agreement declared upon to be given in evidence, until some evidence was previously given, showing the authority of the parties who executed it, to sign it. Assuming *argumenti gratia*, as we have before done as to this point, that the transaction was such that an authority was necessary to be proven, the objection resolves itself simply in a question of the order in which evidence was to be given. We think that there is nothing in it. It was as competent for the party to prove the authority after, as it was before, giving the agreement in evidence.

The second exception was taken to the court's admitting in evidence a letter from defendant in error to plaintiff in error, and the testimony of a witness, that he had examined the records, for the purpose of tracing the title of the defendant in error to the lot in question; and also a deed purporting to be executed by John P. Van Ness, president of the Bank of the Metropolis, to the defendant in error. The letter was merely to inform the plaintiff in error of the sale then advertised to be made of the lot in question, under the deed of trust from Orr to Elgar. The examination of the records, made by the witness, was for the purpose of enabling the defendant in error to decide what course to pursue in relation to the property. We *30] see nothing objectionable in the admission either of the letter or the testimony of the witness. The plaintiff in error certainly was not injured by its admission. The property which the defendant in error had bought, being about to be sold, he causes an examination to be made, that he might know what ground he stood on; then, out of abundant caution, he wrote the letter giving notice of the sale, so that the other party might pursue whatever course they thought best for their safety. The most that can be said of it is, that he hereby proved, that he had done more than he was bound to do. For, if he had chosen, he might have rested upon his contract, without troubling himself, either in examining records or giving the other party notice. Nor have we any doubt as to the admissibility of the deed; some of the counts in the declaration charged, as a breach of the agreement, the failure of the other party to make a deed; a paper having been executed, having the form of a deed, it was altogether proper, then, to give it in evidence, to show that, being sealed, not with the corporate seal, but with that of the president of the bank, it was no deed; and thus sustain the allegation, that no deed had been made. It is clear, beyond doubt, that a paper such as this, not under the corporate seal, is not the deed of the bank, in contemplation of law.

The third exception was taken to the court's receiving in evidence the record of a suit by the Patriotic Bank against Lane, for the purpose of showing that Lane had been sued upon a note for \$3000, mentioned in the deed from B. G. Orr to Elgar, dated August 20th, 1818. We think, that this record was properly admitted. For one important question in the cause was, whether the occasion had occurred, which justified Elgar, the trustee in the deed of trust from Orr, to sell the lot in question. Now, one of the provisions of that deed authorized him to sell, whensoever Lane should be sued on the note for \$3000, given by Orr to the Patriotic Bank and indorsed by Lane, and to pay off that note to the bank. Now, this record proved that Lane had been sued, that, therefore, the *casus foederis* had occurred; that the land was rightfully sold; and therefore, we think was admissible for the purpose for which it was offered. But it was argued, that the note stated

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in the deed of trust as the one indorsed by Lane, purported to be negotiable at the Patriotic Bank, and that the note declared upon in the record did not purport to be negotiable at that bank, and that there was, therefore, a variance. If the question had been raised in the suit brought upon the note, it might have been considered a misdescription ; but in this case, it was offered in evidence to the jury, to prove the fact that Lane had been sued ; it was a question for the jury to consider, whether this evidence was sufficient to satisfy them, that it was the same debt as the one described in the deed from Orr to Elgar ; and therefore, the principle of law, that the allegations, in the parties' pleadings, and their proofs, shall correspond, has no application.

The last exception, after setting out certain evidence given by the plaintiff, without even stating that it was all the evidence, states, *that the defendant prayed an instruction, that upon that evidence, the [*31 plaintiff was not entitled to recover, either upon the first, or second, or third, or fourth counts in the declaration, which instruction the court refused to give ; and we think, very properly. Whether evidence in admissible or not, is a question for the court to decide ; but whether it is sufficient or not, to support the issue, is a question for the jury. This court said, in the *United States v. Laub*, 12 Pet. 5, "It is a point too well settled to be now drawn in question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury." And this proceeds upon this obvious principle : It is the province of the jury to decide what facts are proved ; it is competent to them, to draw from the evidence before them, all such inferences and conclusions as that evidence conduces to prove ; if the court were to tell them, that upon a given state of evidence, the plaintiff could, or could not, recover, then they must, in the assumption of what facts were proved, either discard from their consideration such inferences as the jury might draw, or they must themselves deduce them. The first course would injure the party offering the evidence ; the second, would be a usurpation of the office of the jury. The only case in which the court can make such inferences, and pass upon the sufficiency of the evidence, is by a demurrer to evidence. This would be the case, even if the bill of exceptions professed to state all the evidence ; but the one which we are now considering does not profess to do this, and we cannot assume that it was all. For aught that appears on this record, there was other evidence ; it is enough, however, that it does not appear, that the evidence stated, upon which the instruction was asked, was all.

Having now finished our examination of the several exceptions, we will very briefly notice some points which were pressed upon the consideration of the court. It was said, that the deed of trust from Orr to Elgar, under which the lot in question was sold, was made to indemnify Lane as indorser of Orr's note ; that the Patriotic Bank had no right to call upon the trustee to sell ; that its only right was in a court of equity, to ask to be substituted to the rights of Lane : but upon examining the deed of trust, we find in it a provision, that upon Lane's being sued, the trustee shall sell the lot, and after paying the expenses of the sale, apply the proceeds to the discharge of the notes of Orr, indorsed by Lane, of which the note on which the suit was brought against Lane, was one ; so that this argument fails in its foundation. We entirely concur with the doctrine laid down in 1 Johns. Ch.

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205; 3 Ibid. 261, that where a trust is created for the benefit of a third party, though without his knowledge, at the time, he may affirm the trust, and enforce its execution. The truth is, that although the object of the deed of trust was to secure Lane, its provision, that, in the event which happened, of his being sued, the property should be sold, and the notes which he had indorsed should be paid, was the most effectual means of attaining that *32] *object; these notes were due to the bank, were held by it, and in paying them, therefore, the money must be paid to the bank. Hence the trustee was authorized to sell, at its instance, and to pay it the amount.

It was also argued, that the judgment against Lane was barred by the act of limitations, and that, therefore, the trustee was not authorized to sell, for the purpose of paying a debt which could not be enforced; the provision of the deed which we have already referred to, furnishes an answer also to this objection; for even if it were barred, the claim was in full force, under the trust in the deed. For, although the judgment extinguished the right of action upon the note, yet upon well-established principle, it did not operate at all, by way of extinguishment of the collateral remedy under the deed of trust, though it had relation to, and was intended to secure the payment of the same note. The result, then, of this state of things is, that the property bought by the defendant in error, of the plaintiff in error, was legally sold under an elder subsisting lien; and thus he was utterly divested of all title, so as to show an entire failure of the consideration for which he paid his money, and to enable him to maintain an action for money had and received, to recover it back. We think, that there is no error in the judgment; it is, therefore, affirmed with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per cent. per annum.

*33] *ELIAS KANE, Plaintiff in error, v. GABRIEL PAUL, Executor of EDWARD COURSAULT, Deceased.

Letters-testamentary.—Powers of executors.—Actions by executors.

Letters-testamentary to the estate of Edward Coursault, a merchant, who died at Baltimore, were granted to Gabriel Paul, one of the executors named in the will; the other executor, Aglae Coursault, the wife of Edward Coursault, did not qualify as executrix, nor did she renounce the execution of the will; afterwards, on the application of Aglae Coursault, stating that she was executrix of Edward Coursault, accompanied with a power of attorney, given to her by Gabriel Paul, the qualified executor, who had removed to Missouri, the commissioners under the treaty of indemnity with France, awarded to the estate of Edward Coursault, a sum of money, for the seizure and confiscation of the Good Friends and cargo, by the French government. During the pendency of the claim before the commissioners, Aglae Coursault died; and letters of administration, with the will annexed, were, on the oath of Thomas Dunlap, that the widow and executrix of Edward Coursault was dead, granted by the orphans' court of the county of Washington, in the district of Columbia, to the plaintiff in error, Elias Kane, a resident in Washington; the sum awarded by the commissioners was paid to

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Elias Kane, by the government of the United States. Gabriel Paul, the executor of Edward Coursault, brought an action against Elias Kane, for the money paid to him: *Held*, that he was entitled to recover the same; the letters-testamentary granted in Maryland, entitled the executor of Edward Coursault to recover, without his having the letters of administration granted by the orphans' court of Washington repealed or revoked.¹

At common law, the appointment of an executor vests the whole personal estate in the person so appointed, which he holds as trustee, for the purposes of the will, and he holds the legal title in all the chattels of the testator; for the purpose of administering them, he is as much the proprietor of them as was the testator. The ordinary cannot transfer those chattels to any other person, by granting administration of them.

The act of congress of the 24th June 1812, gives to an executor or administrator, appointed in any state of the United States, or in the territories, a right to recover from any individual, within the district of Columbia, effects or money belonging to the testator or the intestate, in whatever way the same may have been received, if the law does not permit him to retain it on account of some relations borne to the testator or to his executor, which defeats the rights of the executor or administrator; and letters-testamentary or of administration, obtained in either of the states or territories of the Union, give a right to the person having them, to receive and give discharges for such assets, without suit, which may be in the hands of any person within the district of Columbia. The right to receive from the government of the United States, either in the district of Columbia, or in the state where letters have been granted, any sum of money which the government may owe to the testator or intestate, at the time of his death, or which may become due thereafter, or which may accrue to the government, as trustee for a testator or intestate, in any way or at any time, is given by that act. A *bond fide* payment of a debt to the administrator, which was due to the estate, is a legal discharge to the debtor, whether the administration be void or voidable.

The certificate of the register of wills, annexed to the proceedings of the orphans' court of Maryland, granting letters-testamentary to the executor, shows that the will had been proved, and that the letters had been granted; this is proof that the person holding the letters is executor, as far as the law requires it to be proved, in an action of *assumpsit* upon a cause of action which arose in the time of the testator or of the executor. On the plea of the general issue, in such an action, and even in a case where that plea raises the question of right or title in the executor, the certificate of probate and qualification meets the requisition. A judicial examination into their validity can only be gone into, upon a plea in abatement, after *oyer* has been craved and granted; and then, upon issue joined, the plaintiff's title, as executor or administrator, may be disputed, by showing any of those causes which make the grant void *ab initio*, or that the administration had been revoked.

The declaration, in an action by an executor for the recovery of money received by the defendant, after the decease of the testator, may be in the name of the plaintiff, as executor, *or [*34 in his own name, without stating that he is executor. The distinction is, that when an executor sues on a cause of action which accrued in the lifetime of his testator, he must declare in the *detinet*, that is, in his representative capacity only; but when the cause of action accrues after the death of the testator, if the money, when recovered, will be assets, the executor may declare in his representative character, or in his own name.

Paul v. Kane, 5 Cr. C. C. 549, affirmed.

ERROR to the Circuit Court of the District of Columbia, and county of Washington. Edward Coursault, then a merchant of the city of Philadelphia, in December 1809, was the owner of the brig Good Friends, and part of her cargo. Both the brig and cargo were seized at Morlaix, in France, by order of the French government, and were confiscated. In 1825, Edward Coursault died, in Baltimore, where he resided at the time of his decease; and by his will, dated August 1814, he appointed Aglae Coursault, his wife, his executrix, and Gabriel Paul, his executor. On the 27th August 1814, letters-testamentary of the will were granted in Baltimore to Gabriel Paul. Mrs. Coursault did not qualify, nor did she renounce, as executrix. Some time afterwards, Gabriel Paul removed to the state of Missouri. The

¹ And see *Vaughan v. Moody*, 15 Pet. 1; *Wyman v. Halstead*, 109 U. S. 654.

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claim of the estate of Edward Coursault, for indemnity for the seizure and confiscation of the brig Good Friends and cargo, having been provided for by the convention between the United States and France, concluded at Paris, in July 1831, Aglae Coursault, styling herself the widow and executrix of the last will and testament of Edward Coursault, in January 1833, presented a memorial to the board of commissioners appointed to carry the convention into effect, claiming indemnity for the seizure and confiscation of the brig and cargo. The memorial stated the death of Edward Coursault, the appointment of the memorialist and Gabriel Paul executors, by his last will, that letters testamentary were granted to the memorialist and Gabriel Paul; and the memorial also stated, that whatever amount of said claim might be awarded under said convention, would belong, solely and exclusively, to the memorialist, as executor of the last will and testament of the said Edward Coursault, deceased. Together with the documents presented to the commissioners, showing the property of the Good Friends and part of her cargo to have belonged, at the time of the seizure and confiscation, to Edward Coursault, there was a power of attorney from Gabriel Paul, as "administrator of the estate of Edward Coursault," to Mrs. Aglae Coursault, authorizing her to present, in his name, to the commissioners of the United States, the claim of the estate of Edward Coursault, promising to present himself before them as soon as required. The commissioners awarded the sum of \$7864, in favor of the claimant.

On the 27th of March 1837, an affidavit was made and presented to the orphans' court of the county of Washington in the district *of
*35] Columbia, stating that Edward Coursault had died in the city of Baltimore, in 1814, and that Aglae Coursault, his widow and executrix, haddied about two years before the making of the affidavit. On the 29th of March 1837, the judge of the orphans' court directed letters of administration, with the will annexed, to be issued upon the estate of Edward Coursault, to Elias Kane, Esq.; and the sum awarded on the claim of Aglae Coursault, by the commissioners, was paid at the treasury of the United States, to Mr. Kane, as the administrator. Gabriel Paul, in November 1837, as executor of Edward Coursault, having taken out letters of administration in the District of Columbia, instituted a suit in the circuit court of the county of Washington, against Elias Kane, for the recovery of the sum paid to him by the United States; and at November term 1838, the cause was tried, and a verdict and judgment were rendered for the plaintiff.

At the trial, the defendant in the circuit court gave in evidence an exemplification of the letters of administration granted by the orphans' court of the county of Washington; but the court directed the jury that they were no bar to the action of the plaintiff. The defendant excepted to this opinion of the court. And the plaintiff having offered in evidence the award of the commissioners, the power of attorney from the plaintiff to Aglae Coursault (by copies from the state department), and his letters-testamentary, with a copy of the will annexed; and having proved that the plaintiff was then living; the court directed the jury that the plaintiff, if the said evidence was believed, was entitled to recover the amount received by the defendant under the award. The defendant excepted to this direction of the court, and prosecuted this writ of error.

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The cause was argued by *Key*, with whom was *Kane*, for the plaintiff in error; and by *Coxe* and *Semmes*, for the defendant.

Key, for the plaintiff in error, contended, that the letters of administration granted to the plaintiff in the district of Columbia, were not void; and that the instructions of the circuit court were erroneous. If there had not been special legislation on this subject, no doubt could be entertained of the invalidity of the letters of administration granted to Gabriel Paul, in the district of Columbia; after those which had been granted to the plaintiff in error. By the general law, administration is to be granted in the place where the property of the deceased person is found; and letters-testamentary deriving their authority from a different state or country, have no validity. 9 Wheat. 571; *Smith v. Union Bank of Georgetown*, 5 Pet. 518; Story's Conflict of Laws 422, 429-33, 436, 439; 20 Johns. 265.

The special legislation by the act of congress of 24th June 1812, was not intended to make a general change on this subject. It *meant only to authorize suit to be brought on foreign letters of administration, or [*36 letters of administration granted out of the district of Columbia. The court will lean in favor of this construction of the act; and by giving it this limitator, will prevent, as far as possible, the infraction of the principle, that the personal estate of an intestate or decedent is to be distributed according to the local law of the place where it may be.

Nor can the act of congress of 1812, be construed to take away the authority to issue letters of administration in this district, when no administrator of the deceased is within the district, and there are personal effects belonging to the deceased within the same. The law does not take away this jurisdiction of the orphans' court of the county of Washington to issue letters of administration. While it authorizes a foreign administrator to come into this district, it leaves the authority of the orphans' court as it existed before the act. Such a construction of the law would be most unreasonable, and would produce great difficulties and inconveniences. There is no power to compel a foreign administrator to come into this district and collect the assets of the estate. Thus, the personal property of a decedent might be wasted and lost. But to construe the law, as is contended for by the plaintiff in error, is to give it all the efficiency requisite and essential to the purposes of the legislation. The foreign administrator may institute suits in the district; but over assets which are in the district, an administrator duly appointed by the orphans' court, before the foreign administrator comes here, has full and exclusive control and authority. In support of this construction of the act of congress, the counsel cited *United States v. Fisher*, 2 Cranch 358; Bald. 316; Cowp. 391; 6 Dane's Abr. 601, 593; *Foster's Case*, 11 Co. 64 a.

The power given to an administrator in the district, is, to collect and administer the estate of the intestate according to the *lex rei sitæ*. After his appointment, he cannot excuse himself for neglecting to collect the assets of the estate, by alleging that there was another and a foreign administrator; nor would the payment of a debt to a foreign administrator, by a person in the district, be a bar to the claim of an administrator appointed here. Suppose, an administrator appointed in the district should have brought suits, would they abate, when a foreign administrator comes here?

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It is admitted, that the act of congress of 1812 may be interpreted to give concurrent powers to foreign and domestic administrator, but not to make the powers of the foreign administrator exclusive. Story's Conflict of Laws 431.

There is another view of this question. This is not a debt which was due to the intestate of his lifetime. It is money of the estate which came into this district in 1827; and the letters-testamentary, granted in Baltimore, were issued to Gabriel Paul, in 1814. The action in the circuit court was not for money due to the testator, but due to the executor of Coursault.

*37] The action is not, therefore, *authorized by the act of congress, as it authorized suits by the representative of a decedent; but this is a suit in his own right, by the executor. A suit may be brought by an administrator for the recovery of a debt due to him, contracted with him in his capacity of administrator, after the decease of his intestate. 4 Mason 34. But the act of congress gives no power to sue, except in cases where action can be brought, on letters of administration, for debts to, or on contracts with, the intestate. It has no application to suits which a party might institute, without letters of administration; such as suits for claims by the administrator on debts due on contracts or obligations which have arisen after the decease of the party represented by him.

An objection lies to the original letters, testamentary granted in Baltimore to Gabriel Paul. The will of Edward Coursault appointed two executors, and yet, without any renunciation by Aglae Coursault, the letters-testamentary are issued to Gabriel Paul alone. This is contrary to the testamentary act of February 1777, ch. 8.

The counsel for the *defendant* in error stated, that the application to the commissioners, under the treaty of indemnity with France, was made by Aglae Coursault, acting as executrix of her husband, and under a power of attorney from Gabriel Paul, who had regularly proved the will and taken out letters-testamentary. The award of the commissioners was to the executor; this was regular. The sum awarded was the property of the estate of Edward Coursault, being an indemnity for the seizure of his property in his life time; and the claim for a recompense for this injury passed to the executors of his will.

Thus situated, and Aglae Coursault having died, the plaintiff in error came forward; and disregarding the rights of the defendant in error, which were his by the letters-testamentary, and by the award of the commissioners under the treaty, he obtained possession of this money, under letters of administration granted to him in the district of Columbia. He did not come forward as a creditor of the estate of Edward Coursault, but as a stranger, and took possession of the fund. This was an illegal interference with the rights of the executor, and cannot be allowed. The provisions of the act of congress on the subject of the claims under the treaty with France have been violated; rights clearly vested under the law and by the award of the commissioners, have been disregarded.

The fund awarded under the treaty with France was not assets in the district of Columbia. The claim had been presented on the part of the representatives of a merchant of Baltimore, for the seizure of his vessel and cargo; and the United States having received the money from France,

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were trustees for the claimants, to distribute the same among them. If this fund had any location, it was in Baltimore; there the United States were bound to pay the amount awarded to the executor of Edward Coursault. In point of fact, the money was paid in New York, as there it had been kept by *the United States, when received from France. All that was required was the presentation of the award of the commissioners, [*38 to the agents of the United States in New York.

The action in the circuit court was properly brought. But if this was not so, the exception should have been taken by a plea in abatement. The plea of the general issue admits the right of the executor to sue. 8 Wheat. 542; 1 Pet. 386; 4 Ibid. 500; *Baker v. Biddle*, Bald. 394. To show the right of the executor to sue, cited, *Biddle v. Wilkins*, 1 Pet. 686; 1 Vent. 535; 1 Mod. 213; 2 Ibid. 149; Hob. 46; 2 Ld. Raym. 701; 1 Williams on Exec. 155. An administration granted, where there is an executor, is void. 3 Bos. & Pul. 30; Toller on Exec. 120; 8 Cranch 1.

WAYNE, Justice, delivered the opinion of the court.—It appears in this case, that Edward Coursault, being domiciled in Baltimore, died there, in the year 1814; and that by his will, dated the 13th August 1814, he appointed Aglae Coursault, executrix, and Gabriel Paul, executor. On the 27th August 1814, letters testamentary were granted in Maryland, to Gabriel Paul; Paul is still alive. Edward Coursault being the owner of the brig Good Friends, and part of her cargo, both were seized and confiscated at Morlaix, in the year 1809, by the French government. Paul, the qualified executor of Coursault, by a power of attorney, dated the 18th of October 1832, he being then a resident of Missouri, empowered Aglae Coursault to present a memorial, in his name, to the board of commissioners, appointed under the act of congress to carry into effect the convention between the United States and his majesty the king of the French, concluded at Paris, on the 4th day of July 1831, for the claim of the testator to indemnity on account of the confiscation of the Good Friends, and her cargo; stating in his power, that he would present himself before the board of commissioners as soon as he might be required. Under this power, Aglae Coursault memorialized the commissioners; in which memorial, after reciting the seizure and confiscation of the Good Friends and her cargo, what the cargo was, the value of the vessel and her freight, and that Edward Coursault had incurred great expense in defending his rights; it is said, letters-testamentary were granted to herself and Gabriel Paul, and that whatever sum may be awarded upon the claim, it would belong exclusively to herself. The commissioners made an award in favor of the claim.

After this award was made, Kane, the appellant, applied to the orphans' court of the county of Washington, in the district of Columbia, for letters of administration upon the estate of Edward Coursault; and upon an affidavit of Thomas Dunlap, stating that the widow and executrix, Aglae Coursault, was dead, an order was made, to issue letters of administration to the appellant, upon the estate of Edward Coursault; and letters of administration *de bonis *non*, with the will annexed, were given to him, he having entered into bond, with Thomas Dunlap and John [*39 K. Kane, as sureties for the faithful performance of his duties. Kane applied for, and received from the proper department of the government, a

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part of the sum awarded by the commissioners upon the claim of Edward Coursault; and this suit was brought by Gabriel Paul, the executor, to recover from Kane the money he received, in his character of administrator *de bonis non, cum testamento annexo*.

The declaration contains three counts, in each of which the plaintiff claims as executor. The defendant pleaded *non assumpsit*; and issue being joined, a jury was called to try the issue. On the trial, besides other evidence, the plaintiff produced his letters-testamentary, granted in 1814, in Maryland; and the defendant offered in evidence an exemplification of the letters of administration granted to him by the orphans' court of Washington county, district of Columbia, in 1837. The court charged the jury, that the letters of administration offered by the defendant, were no bar to the plaintiff's action; but that the plaintiff's letters-testamentary and the other evidence, if believed by the jury, entitled him to recover the amount the defendant had received upon the award of the commissioners, according to the certificate of that amount, given by John H. Houston, a clerk in the fifth auditor's office. The jury gave a verdict in favor of the plaintiff; the defendant having first excepted to the instructions of the court.

The point, then, made by this exception to the instruction of the court is, do the letters-testamentary, obtained by the plaintiff in Maryland, prevail over the letters of administration *de bonis non, cum testamento annexo*, given to the defendant in the district of Columbia, so as to entitle the former to recover from the latter, the money received by him in such character, without a repeal or revocation of such letters? The answer to that question will depend upon the legal character of the letters granted to the defendant. Are they void or voidable?

In Com. Dig. Adm. B. 1, it is said, if there be an executor, and administration be granted before probate and refusal, it shall be void, on the will being afterwards proved; although the will were suppressed, or its existence were unknown, or it were dubious who was executor, or he were concealed or abroad, at the time of granting the administration. So, in Com. Dig. B. 2, B. 10, if there be two executors, one of whom proves the will and the other refuses, and he who proves the will dies, and administration is granted, before the refusal of the survivor, subsequently to the death of his co-executor, or if granted before the refusal of the executor, although he afterwards refuse, such administration shall be void. In all these cases, the administration is a mere nullity. The executor's interest the ordinary is incapable of divesting. Toller on Exec. 121.

*40] "In the case of *Griffith v. Frazier*, 8 Cranch 24, the court says, "The appointment of an executor vests the whole personal estate in the person so appointed. He holds as trustee, for the purposes of the will, but he holds the legal title in all the chattels of the testator. He is, for the purpose of administering them, as much the legal proprietor of those chattels, as was the testator himself while alive. This is incompatible with any power in the ordinary to transfer those chattels to any other person by the grant of administration on them. His grant can pass nothing; it conveys no right, and is a void act." Such is the common law.

Notwithstanding the extended jurisdiction given by the statutes of Maryland to the orphans' court, in testamentary cases, we cannot see in them any alteration of the legal consequence resulting from the grant by

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that court of letters of administration, in case of a will, when there is an executor, not disqualified by law, or who has not been excluded from acting, in conformity to law. The grant of administration is void, as at common law. The powers given to the court are intended to protect the rights of executors; not to enlarge its jurisdiction to transfer them to another person. The action of the court, to be effective to grant administration upon a will, an executor being alive, and capable of acting, must be within its powers. If not, the administration will be void. This conclusion is sustained, too, by the stern manner in which the orphans' court is confined within its jurisdiction, by the statute of 1798, ch. 101, sub-div. 15. "The said orphans' court shall not, under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by this act, or some other law." The letters being void, the person named in them cannot retain from the rightful executor the testator's effects; upon the plea that he may do so, until the letters have been revoked by the court which granted them. The appearance of an executor, with proof of the will and letters testamentary, subsequently to the grant of letters of administration, in a case where it was supposed there was no will, is of itself a revocation of the latter; and so is the Maryland law. Dorsey's Maryland Testamentary Law 4, § 77.

In this case, then, though the right of the plaintiff to sue in the district of Columbia is given by the act of congress of the 24th June 1812 (2 U. S. Stat. 755), his right to recover rests upon the legal conclusion that the defendant never was administrator to administer the effects of the testator; the act of the orphans' court naming him such, being void *ab initio*. His right under that act is, to "maintain any suit or action, and to prosecute and recover any claim in the district of Columbia, in the same manner as if his letters testamentary or administration had been granted by the proper authority," &c., "in such district." In the case before us, there was a will which had been proved in Maryland; letters-testamentary granted to an executor; that executor was alive (and is still so) when the orphans' court gave letters *to the defendant, upon the proof that the executrix named in the will was dead; without any inquiry concerning the [*41 executor, but in the face of the certificate of his letters-testamentary.

It was repeatedly asked, on the argument of this cause, what rights can letters-testamentary or of administration, granted in either of the states of this Union, give to an executor or administrator, in the district of Columbia, except the right to sue, given by the act of congress of 1812. (2 U. S. Stat. 755.) We answer, that the right to sue in the manner it is given, gives the right to such executor or administrator to recover from any individual within the district of Columbia, effects or money belonging to the testator or intestate, in whatever way they may have been received, if the law does not permit him to retain them, on account of some relation borne to the testator or to his executor, which defeats the executor's right; and that letters-testamentary or of administration obtained in either of the states or territories of this Union, give a right to the person having them, to receive and give discharges for assets, without suit, which may be in the hands of any person within the district of Columbia; and the right to receive from the government, either in the district or in the state where letters have been granted, any sum of money which the government may owe

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to a testator or intestate, at the time of his death, or which may become due thereafter, or which may accrue to the government from a testator or intestate, in any way or at any time. And a *bona fide* payment to the administrator, of a debt due to the estate, will be a legal discharge to the debtor, whether the administration be void or voidable. Toller 130 ; *Allen v. Dundas*, 3 T. R. 125.

It was, however, urged, that the court erred in its instruction to the jury, because the letters-testamentary of the plaintiff appear on the face of them to have been granted in violation of the law of Maryland (Dors. Test. Law 6, § 77), which declares, that letters-testamentary shall not be granted to any one, or to any number of executors, less than the whole ; unless there shall be such proceedings against each of them failing, as would authorize the issuing of letters of administration, in case of the failure of a sole-named executor. Whether such proceeding were had or not, the record does not show ; but if it did, the objection would not prevail. The certificate of the register of wills, annexed to the proceeding of the orphans' court, giving letters to the defendant, shows that the will had been proved, and that the plaintiff had received letters-testamentary. That he is executor, then, is proved, as much as the law requires it to be ; whether the declaration is in *assumpsit* upon a cause of action arising in the time of the testator, or in that of the executor. The plea was the general issue ; and even in a case where that plea raises the question of right or time in the executor, the certificate of probate and qualification as executor, meets the requisition. A judicial examination into their validity can only be gone into upon a plea in abatement, after *oyer* has been craved and granted ; and then, upon issue *42] joined, the plaintiff's title as executor or administrator *may be disputed, by showing any of those causes which make the grant void *ab initio*, or that the administration has been revoked. The title of an administrator is proved by the production of the letters of administration. 2 Phil. Evid. 550, 551 ; *Childress v. Emory*, 8 Wheat. 671. Nor can such objection prevail, because the plaintiff omitted to make *profert* of his letters-testamentary, in his declaration, for that is aided, unless the defendant demur specially for the defect. 4 Ann. ch. 11 ; 1 Saund. on Plead. 574.

It was also objected against the recovery in this case, that the money of the testator having been received by the defendant, after the death of the testator, the declaration should have been in the plaintiff's own name, and not as executor. The law is now well established, that it may be in either form. The distinction is, that when an executor sues in respect of a cause of action which occurred in the lifetime of the deceased, he must declare in the *detinet*, that is, in his representative capacity only. But where the cause of action accrues after the death of the testator, if the money recovered will be assets, the executor may declare in his representative character, or in his own name.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel : On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*WILLIAM COVINGTON, Plaintiff in error, v. DAVID A. COMSTOCK,
Defendant in error.

Promissory notes.

An action was instituted in the circuit court of Mississippi, on a promissory note, dated at and payable in New York; the declaration omitted to state the place at which the note was payable, and that a demand of payment had been made at that place. The court held, that to maintain an action against the maker of a promissory note or bill of exchange, payable at a particular place, it is not necessary to aver in the declaration, that the note, when due, was presented at the place for payment, and was not paid; but the place of payment is a material part in the description of the note, and must be set out in the declaration.

ERROR to the District Court for the Northern District of Mississippi. An action was instituted in the district court of Mississippi, by the defendant in error, on a promissory note, dated at New York, March 2, 1836, by which Covington & McMorris promised to pay \$4560.04, six months after date, to Nelson, Carleton & Company, at New York. The note was indorsed by the payees to the defendant in error, David A. Comstock.

The declaration on the note omitted to state the place where the note was payable; and on the trial, the note was offered in evidence, and objected to by the defendant. The court allowed the note to be given in evidence; on which the defendant tendered a bill of exceptions; and a verdict and judgment having been rendered for the plaintiff, this writ of error was prosecuted.

The case was argued by *Cocke*, with whom was *Key*, for the plaintiff in error. No counsel appeared for the defendant.

Cocke contended, that it was necessary to state the place at which payment of the note was to be made; and to prove a demand at the place. That the note being joint, a separate action could not be maintained upon it.

Nothing is clearer, than that a declaration on a note payable at a particular place, should state the place of payment. The omission to do this is fatal. Cited, *Bailey on Bills* 429; 3 *Camp.* 453; *Chitty on Bills* 321; 14 *East* 500; 15 *Ibid.* 110; 5 *Taunt.* 7; 3 *Camp.* 248 and note.

MCLAN, Justice, delivered of the opinion the court.—This case is brought before this court from the circuit court of Mississippi, by a writ of error. The plaintiff in the circuit court brought his action on a promissory note, and stated in his declaration, that the defendant, “heretofore, to wit, on the 2d day of March 1836, at New York, to wit, in the district aforesaid, made a certain note in writing, commonly *called a promissory note, bearing date the day and year last aforesaid, and then and there [*44 delivered the said note to Nelson, Carleton & Co., who are citizens of the state of New York; by which said note, the said defendant promised, by the name and style of Covington & McMorris, to pay to said Nelson, Carleton & Co., or order \$4560.04, six months after the date thereof, for value received; and the said Nelson, Carleton & Co. then and there indorsed and delivered said note to the said plaintiff,” etc. The defendant pleaded the general issue; and on the trial, the following note was offered in evidence.

\$4560.04.

New York, March 2d, 1836.

Six months after date, we, the subscribers, of Columbus, state of Mis-

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issippi, promise to pay the order of Nelson, Carleton & Co. forty-five hundred sixty dollars and four cents, at New York, for value received.

COVINGTON & McMORRIS.

The defendant objected to the note being given in evidence, on the ground, that there was a material variance between it and the note described in the declaration. But the circuit court overruled the objection, admitted the note in evidence, and entered a judgment for the plaintiff. The defendant excepted to this ruling of the court; and the question now is, whether there is error in the decision of the circuit court. The note given in evidence was payable at New York; but the place of payment was not stated in the declaration.

To maintain an action against the maker of a note or bill, payable at a particular place, it is not necessary to aver in the declaration, that the note, when due, was presented at the place for payment, and was not paid; but the place of payment is a material part in the description of the note, and must be set out in the declaration. The place of payment regulates the rate of interest, and in other respects may become important. A note, payable generally, is a very different instrument from a note given by the same parties, and for the same amount, payable at New York. We think, therefore, that the circuit court erred in admitting the note as evidence; for which cause the judgment is reversed; and the cause is remanded for further proceedings in the circuit court, were the plaintiff may move to amend the defect in his declaration.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the northern district of Mississippi, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.

*45] *JOSEPH SMITH, Appellant, v. The CHESAPEAKE AND OHIO CANAL COMPANY, Appellees.¹

Transfer of franchises.

The legislatures of Virginia and Maryland authorized the surrender of the charter granted by those states to the Potomac Company to be made to the Chesapeake and Ohio Canal Company, the stockholders of the Potomac Company assenting to the same; a provision was made in the acts, authorizing the surrender, for the payment of a certain amount of the debts of the Potomac Company by the Chesapeake and Ohio Canal Company, a list of those debts to be made out, and certified by the Potomac Company. This assignment does not impair the obligation of the contract of the Potomac Company with any one of its creditors, nor place him in a worse situation in regard to his demand; the means of payment possessed by the old company are carefully preserved, and, indeed, guaranteed by the new corporation; and if

¹ Reported below, in 5 Cr. C. C. 563; but affirmed without reference to the point decided in the circuit court.

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the fact can be established, that some *bonâ fide* creditors of the Potomac Company were unprovided for in the new charter, and have, consequently, no redress against the Chesapeake and Ohio Canal Company, it does not follow, that they are without remedy.

APPEAL from the Circuit Court of the District of Columbia, and county of Alexandria. In the circuit court for Alexandria county, the appellant filed a bill to compel the Chesapeake and Ohio Canal Company to pay to him a proportion of the amount of a judgment obtained for a prize drawn in a lottery authorized to be drawn by "The Potomac Company," the judgment having been assigned to the claimant, to the amount for which the bill was filed. The Chesapeake and Ohio Canal Company, under the authority of their act of incorporation, and of acts passed by the legislatures of the states of Virginia and Maryland, had become entitled to, and held all the property, rights and privileges owned and possessed by the Potomac Company, under their charters; and were subjected to the payment of certain debts due by the Potomac company, according to the provisions of their charter, and the acts of assembly referred to. The whole case is fully stated in the opinion of the court.

The case was argued by *Semmes* and *Lee*, for the appellants; and by *Key* and *Jones*, for the appellees.

McLEAN, Justice, delivered the opinion of the court.—This is an appeal, in chancery, from the decree of the circuit court of the district of Columbia. The complainant represents himself to be a judgment-creditor of the Potomac Company, which was incorporated in 1784, by acts of the Virginia and Maryland legislatures, for the purpose of opening and extending the navigation of the Potomac river. That on the organization of the Chesapeake and Ohio Canal Company, in 1825, under a charter obtained the preceding year, the Potomac Company surrendered its charter, and conveyed to the new company all "the *property, rights and privileges by them owned." That certificates of stock in the old company, and also its [*46 debts, were made receivable by the new company in payment for stock; and certain provision was made in behalf of those creditors who should not take stock in payment of their claims. And the complainant states that the defendants have refused to take any step to pay his judgment, or to recognise his demand as coming within the provision in behalf of the creditors of the Potomac Company. And he prays that an account may be taken, and that such dividend as he may be entitled to receive, may be decreed to him.

The defendants, in their answer, admit the obtainment of the judgment, but aver that it was founded on a claim against the Potomac Company for a prize drawn in a lottery, under an act of the state of Maryland; which lottery was drawn beyond the limits of that state, and within the district of Columbia, not only without authority, but against law. And they insist, that the lottery being void, the prize alleged to have been drawn by the complainant or his assignor, can give no right of action at law, or entitle him to relief in equity. The defendants also allege, that the demand of the complainant was not included in the list of debts due by the Potomac Company, for which provision was made under the new charter.

The statements in the answer, in regard to the illegality of the lottery, are not responsive to the bill; and there is no proof in the record, where the

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lottery was drawn. On the 7th January 1810, the legislature of Maryland, by an act, authorized the Potomac Company, for the purpose of improving the navigation of the Potomac river, &c., to raise a sum of money, not exceeding \$300,000. But, as there is nothing in the record, or in the evidence, which conduces to prove that the lottery was not drawn in pursuance of the act, the court cannot presume, that it was so drawn, and thereby defeat the plaintiff's right. If the statements of the answer, in this respect, were proved, the judgment could interpose no obstacle to giving to them full consideration and effect. The complainant asks the aid of a court of chancery to give effect to his judgment; and this no court of chancery will do, in violation of the established rules of equity.

The second section of the act incorporating the Chesapeake and Ohio Canal Company, provides, that subscriptions for the stock may be paid, either "in the legal currency of the United States, or in the certificates of stock of the present Potomac Company, at the par or nominal value thereof; or in the claims of the creditors of the said company, certified by the acting president and directors to have been due for principal and interest, on the day on which the assent of the said company shall have been signified by their corporate act, as hereinbefore required; provided, that the said certificates of stock shall not exceed, in the whole amount, the sum of \$311,111.11; *47] *nor the said claims the sum of \$175,800." And in the twelfth section, it is provided, "that it shall be the duty of the president and directors of the Chesapeake and Ohio Canal Company, so long as there shall be and remain any creditor of the Potomac Company, who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company, to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said proposed company, as the demand of the said creditor or creditors at this time may bear to the whole debt of \$175,800." This sum, it was supposed, would cover the debts of the Potomac Company; and there is a statement in the record showing the different items which produced this aggregate amount. The judgment of the plaintiff is not included in this statement.

The liability of the defendants to the stockholders and creditors of the Potomac Company, arises wholly under their charter; and the extent of that liability is shown by the above extracts. They were bound to receive the certificates of stock and debts of the Potomac Company, in payment for stock; and to pay a proportionate dividend to those creditors who should not subscribe for stock. The stockholders and creditors of the old company were named, so that the liability of the new corporation was not only specific as to amount, but also as to individual creditors. The contract was made in their charter, and there is no allegation or pretence, that the defendants colluded with the Potomac Company to defraud either its stockholders or creditors. The responsibility of the defendants, then, cannot extend beyond the express terms of their contract.

It is insisted, that the twelfth section embraces all creditors of the Potomac Company; and requires that the average dividend paid by that company, the last five years preceding the surrender of its charter, should be paid to them. But that this is not the true construction, is shown, by the further limitation imposed in the same section. The sum of \$175,800, being

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the amount of the debts, is made the basis on which the dividend is to be apportioned. The net average revenue for the five years being ascertained, it is easy to calculate what per cent. this would pay on the sum stated as the total amount of debts; and the same per cent. must necessarily be paid on the amount due the creditors respectively. This is a very simple operation, and it shows very clearly, that the sum stated was the maximum of debts to be provided for.

Four thousand dollars of the plaintiff's judgment were assigned to Haley & Sukeley; and it appears that George Sukeley was entered on the books of the Ohio and Chesapeake Canal Company, *as a subscriber for \$4000 of stock, payable in debts of the Potomac Company. But it [*48 seems, the company afterwards refused to receive the above assignment in payment for the stock. From the fact of this subscription being made, an inference is drawn, that the defendants considered themselves liable for the judgment of the plaintiff. It is probable, the subscription of Sukeley was entered though mistake; and it seems, the company refused to ratify it. No presumption can be drawn from this circumstance, which can, in any degree, influence the construction of the contract in the charter.

There can be no doubt, that the states of Virginia and Maryland, in granting the charter of the Chesapeake and Ohio Canal Company, had the power to authorize a surrender of the charter of the Potomac Company, with the consent of the stockholders; and to make the provision which they did make for the creditors of the company. This assignment does not impair the obligation of the contract of any creditor of the company, nor place him in a worse situation in regard to his demand. The means of payment possessed by the old company are carefully preserved, and, indeed, guarantied by the new corporation. And if the fact can be established, which is denied by the defendants, that some *bona fide* creditors of the Potomac Company were unprovided for in the new charter, and consequently, have no redress against the defendants, it does not follow, that they are without remedy. It may be, that all the creditors whose demands make up the sum of \$175,800, have not claimed stock in the new company, or the proportionate dividend secured to them. But if they have not asserted their right to stock or the dividend, they may yet claim either, and the defendants are bound to satisfy their demand.

Upon the whole, we are of the opinion, that the defendants are not liable, under their contract with the Potomac Company, to pay the judgment of the plaintiff; or to pay him a proportionate share of the net revenue of the Potomac Company stock, under the twelfth section; the decree of the circuit court, which dismissed the bill, is, therefore, affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby affirmed, with costs.

*JOHN S. MITCHELL, Executor and Devisee of ANDREW MITCHELL, deceased, Plaintiff in error, v. ROBERT LENOX and others, Defendants in error.

Judgments of state courts.

The fourth article of the constitution of the United States, which declares, that, "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," cannot, by any just construction of its words, be held to embrace an alleged error in a decree of a state court, asserted to be in collision with a prior decision of the same court, in the same case.

ERROR to the Court for the Correction of Errors of the state of New York.

Crittenden moved to dismiss this writ of error, on the ground that the court had no jurisdiction. This motion was opposed by the counsel for the plaintiff in error.

TANEY, Ch. J., delivered the opinion of the court.—This case is brought here by a writ of error to revise the decree of the court for the correction of errors of the state of New York. It appears, that a bill was filed in the chancery court of New York, by Andrew Mitchell, the plaintiff's testator, against Robert Lenox and others, in order to obtain an account of a certain estate of the complainant, which he alleged that he had assigned and delivered to them upon certain trusts. The defendants, among other things, insisted, that the said estate of the complainant had, afterwards, with his consent, been assigned to certain other trustees, upon the same trusts expressed in the original deed to them. It is unnecessary to state the nature of the controversy more fully, for the purposes of this motion. The bill, it seems, came to final hearing before the vice-chancellor of the first circuit of the state of New York, who dismissed the bill, without prejudice to the complainant's right to make the same defendants parties to a new bill, if he should think proper to file one against the second trustees, or the survivor of them. The complainant appealed from this decree to the chancellor, who affirmed it; and he appealed from the chancellor's decree to the court for the correction of errors, and that court affirmed the chancellor's decree.

The plaintiff's testator thereupon filed a new bill against the same defendants, in which he made the survivor of the second set of trustees also a party defendant; and upon the final hearing, this second bill was dismissed by the chancellor, and his decree was afterwards affirmed by the court for the correction of errors. It is from this last decree, that the writ of error to this court is brought.

It does not appear from the record, that any of the questions enumerated in the 25th section of the act of congress, of 1789, arose in the court of errors; and consequently, this court is not *authorized to review its judgment. It has, indeed, been contended by the plaintiff in error, that the second decree is in collision with the first; and that, in this respect, it violates the first section of the fourth article of the constitution of the United States, which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other

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state." Now, if it were admitted that the second decree is in collision with the first (which we certainly do not mean to say is the case), yet the article of the constitution above quoted cannot, by any just construction of its words, be held to embrace an error of that description, nor give this court the right to review the decree. The writ of error must, therefore, be dismissed, for want of jurisdiction.

THIS cause came on to be heard, on the transcript of the record of the court of chancery of the state of New York, returned with the writ of error in this case, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that this writ of error to the court of chancery of the state of New York be and the same is hereby dismissed, for the want of jurisdiction ; and that this cause be and the same is hereby remanded to the said court of chancery.

*FRANCIS WEST and others, Appellants, v. WALTER BRASHEAR, [*51
Appellee.

Mandate.

The mandate of the supreme court to the circuit court must be its guide in executing the judgment or decree on which it issued ; the mandate is the judgment of the supreme court, transmitted to the circuit court ; and where the direction contained in it is precise and unambiguous, it is the duty of the circuit court to carry it into execution, and not to look elsewhere for authority to change its meaning. But when the circuit court are referred to testimony to ascertain the amount to be decreed, and are authorized to take more evidence on the point, it may sometimes happen, that there will be some uncertainty and ambiguity in the mandate ; and in such a case, the court below have unquestionably the right to resort to the opinion of the supreme court, delivered at the time of the decree, in order to assist them in expounding it.

APPEAL from the Circuit Court of Kentucky. This case was before the court on appeals by both the parties ; and the proceedings and decision on the case are reported in 7 Pet. 608.

The proceedings in the circuit court of Kentucky, subsequent to the mandate issued from the supreme court, were the only matters in controversy on this appeal. The mandate of the supreme court was as follows :

"Whereas, lately, in the circuit court of the United States for the district of Kentucky, before you or some of you, in a cause between Walter Brashear, complainant, and Francis West and John Lapsley, and Samuel Mifflin and Henry Nixon, trustees of said West, and Thomas M. Willing and Henry Nixon, executors of John Nixon, deceased, defendants in chancery, the decree of the said circuit court was in the following words, to wit : 'It is the opinion of the court, that the complainant is, in equity, entitled to a credit or set-off against the judgments at law obtained against him in the name of West, for the sum of \$4011.68, being the amount of the judgment obtained against the complainant, as special bail for West, by George Anderson ; but the complainant is not entitled to any of the other credits or set-offs claimed in his bill, and amended bill. It is, therefore, decreed and ordered, that the said \$4011.68, or so much thereof as will extinguish the same, shall be and is hereby credited and set off as payment, on the 22d of October 1810, against the judgment at law, not against or not

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covered by the injunction bond ; and that the residue of the said \$4011.68, if any, and the costs of the complainant in this suit, shall be and is hereby credited and set off against so much of the other judgment at law ; the costs to be credited as of this day : and the clerk is hereby directed to tax the costs of this suit, and make the necessary calculations, and enter said credits accordingly ; and *it is further decreed and ordered, that as *52] to the residue of the said judgments or judgment, as the case may be, after entering and giving the credits as aforesaid, the complainant's injunction shall be and the same is hereby dissolved, with ten per centum damages upon the amount of such residue, at the time the injunction was granted, and that the complainants may proceed to recover by execution at law, the said residue, and also the damages aforesaid, as by the inspection of the transcript of the record of the said circuit court, which was brought into the supreme court of the United States by virtue of an appeal, agreeable to an act of congress in such cases made and provided, fully and at large appears.' And whereas, at the present term of January, in the year of our Lord 1833, the said cause came on to be heard before the said supreme court, on the said transcript of the record, and was argued by counsel ; on consideration whereof, this court was of opinion, that there is error in the decree of the said circuit court, in allowing to the said Walter Brashear credit for the money paid by him as special bail for Francis West, at the suit of George Anderson, and also in refusing to allow the said Walter Brashear credit for the value of the ginseng shipped and sold by the said James Latimer, with the assent of the said assignees of Francis West, after the same had been attached in his hands by the said assignees: It is therefore decreed and ordered, that the decree pronounced in this cause by the court of the United States for the seventh circuit, in the district of Kentucky, be reversed and annulled, and that the cause be remanded to that court, with instructions to perpetuate the injunction as to the sum which shall be equal to the amount of the ginseng shipped and sold by the said James Latimer, after the attachment sued out by Francis West, for the use of Samuel Mifflin, John Lapsley and Henry Nixon, assignees for the benefit of his creditors, was levied, and to dismiss the bill as to the residue ; and it is further ordered, that the parties pay their own costs in this court. You, therefore, are hereby commanded, that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as, according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

The cause being before the circuit court on the mandate, in November 1833, it was referred to a commissioner to state the accounts between the parties, in conformity thereto ; and general leave was also given to take the deposition of James Latimer. Under this order of the court, the commissioner made a report, and stated that he gave credit to Brashear, under date of May 11th, 1809, for \$2873.50, the amount of ginseng shipped by Latimer & Redwood. On exceptions filed to this report, it was set aside by the court, on account of a sufficient sum not having been allowed for the ginseng shipped by Latimer, after a foreign attachment, sued out by West, *53] *had been levied on the ginseng in the hands of Latimer. The commissioner, to whom it was recommitted, was instructed to examine and ascertain all the ginseng shipped and sold by Latimer, after the attach-

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ment, and all the charges on the same. The commissioner reported the value of the ginseng was \$5593.50, and the charges amounting to \$361.60. Exceptions were filed to this report, which were overruled; and the circuit court gave a decree in favor of Walter Brashear in conformity with the same. The complainants prosecuted this appeal.

The case was argued by *Coxe*, for the appellants; and by *Crittenden*, for the appellees.

For the appellants, *Coxe* contended, that the mandate of this court did not authorize the allowance of the whole amount of the ginseng belonging to Brashear, which had been shipped to Canton by Mr. Latimer; but only that part of it shipped after the attachment laid by the appellants. The whole value of it is allowed in the decree of the circuit court.

Crittenden claimed, that by a true interpretation of the mandate, the sum allowed in the decree was the amount reported by the commissioner.

The counsel for both parties supported their allegations by a reference to the report of the case in 7 Peters, and to the proceedings of the circuit court under the mandate; which are referred to in the opinion of the court.

TANEY, Ch. J., delivered the opinion of the court.—This case was formerly before the court, and was then fully considered and decided, and is reported in 7 Pet. 608. Upon that occasion, the decree of the circuit court was reversed; and a mandate was issued from this court, directing the circuit court to disallow certain credits which had been given to Walter Brashear, the present appellee, and to allow him a credit equal to the amount of certain ginseng, shipped and sold by James Latimer, after attachments had been laid in his hands, by Francis West, the present appellant, and others.

Brashear resided in Kentucky, and Latimer was his consignee and agent in Philadelphia, and had received from him, on consignment, a large quantity of ginseng; and had also made advances for him to a considerable amount, but not equal to the value of the consignment. Francis West was a creditor of Brashear, and, together with other creditors, laid attachments on his property and credits, in the hands of Latimer; and these were a part of the matters in controversy in the former suit. The mandate of this court will be found in page 624 of the report above mentioned, *and the controversy in this case turns upon the construction of that mandate. [*54]

There is no contest here in relation to the items which this court directed to be disallowed. But a dispute arose in the circuit court as to the amount of the sum directed to be credited to Brashear, and some further testimony was taken on that point, in the proceedings under the mandate. It finally appeared, that the value of the ginseng shipped and sold by Latimer, after the attachments were laid in his hands, amounted to \$5599.90; and for this sum Brashear was credited by the decree of the circuit court. The appellants object to this decree, and insist, that although a strict construction of the mandate might justify the credit, yet the mandate must be taken in

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connection with the opinion pronounced at the same time ; and when thus expounded, it will not, as they contend, warrant the decree.

The point of the appellant's objection consists in this : that although the ginseng shipped and sold by Latimer, after the attachments were laid in his hands, amounted to the sum decreed by the court below, yet that a part of it had before been taken by Latimer, at a stipulated price, agreed on between him and Brashear ; and that the value of the quantity actually owned by Brashear, and shipped and sold as aforesaid, amounted only to the sum of \$2753.80 ; and that the residue so shipped and sold was owned by Latimer as above mentioned. And the appellants contend, that it is apparent from the opinion pronounced by this court, when the case was formerly before them, that the imputed negligence and misconduct which in the judgment of the court made them liable to Brashear, was confined to the ginseng seized by the attachment, and did not extend to the money due from Latimer for the quantity taken by him as above mentioned, although that money was also subsequently lost by Latimer's insolvency ; and they contend, that the credit allowed under the mandate ought to have been \$2753.80, and that the court erred in allowing more.

There has been some discussion at the bar, as to the principles by which a circuit court of the United States is to be governed, when executing a mandate from the supreme court. Undoubtedly, the mandate must be its guide. It is the judgment of this court, transmitted to the circuit court. And when the direction contained in the mandate is precise and unambiguous, it is the duty of the circuit court to carry it into execution, and not to look elsewhere for authority to change its meaning. But when, as in this case, the circuit court are referred to testimony to ascertain the amount to be decreed, and are authorized to take new evidence on the point, it may sometimes happen, that there will be some uncertainty and ambiguity in the mandate ; and in such a case, the court below have, unquestionably, the

*55] right to resort to the opinion delivered at the *time, in order to assist them in expounding it. And if, in this case, it had appeared from the opinion delivered, that in speaking of the ginseng shipped and sold by Latimer, the court intended to confine the credit to the value of that portion of it owned by Brashear, at the time of the shipment, and to exclude that alleged to have been taken by Latimer, it would have been the duty of the circuit court to execute the mandate in conformity with this intention.

But there is no discrepancy between the mandate, and the opinion pronounced at the time. It is evident, that the court were under the impression, that all of the ginseng taken by Latimer to pay his own debt, and been shipped before the attachments were laid. This appears from a paragraph in the opinion of the court, in page 610 of the reported case. In stating the facts of the case, as in the judgment of the court they were proved by the testimony, the chief justice, who delivered the opinion, says : " Early in the year 1809, he (Latimer) took a large part of the ginseng to himself, as purchaser, at six months' credit, which he shipped on his own account to China, in March of that year. In the following May, he shipped the residue on account of himself and William Redwood." This latter shipment was made after the attachments were levied, and the court were manifestly of the opinion, that the value of the whole parcel thus shipped was liable in Latimer's hands to the attaching-creditors. And believing from the testimony,

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that it was lost by the negligence and misconduct of these creditors, and the subsequent insolvency of Latimer, they directed Brashear to be credited with the whole amount thus shipped. The intention of the court, therefore, as gathered from the opinion, is in unison with the direction contained in the mandate ; and, in our judgment, the circuit court have rightly expounded it. The decree of the court below is affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel : On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*THE COMMONWEALTH BANK OF KENTUCKY, Plaintiff in error, v. [*56
THOMAS GRIFFITH and others, Defendants in error.

Error to state courts.

Under the 25th section of the judiciary act of 1789, three things are necessary to give the supreme court jurisdiction of a case brought up by writ of error or appeal: 1. The validity of a statute of the United States, or of an authority exercised under a state, must be drawn in question. 2. It must be drawn in question on the ground that it is repugnant to the constitution, treaties or laws of the United States. 3. The decision of the state court must be in favor of its validity.

Where the decision of a state court is against the validity of a state statute, as contrary to the constitution of the United States, a writ of error does not lie to the supreme court upon such a judgment.¹

ERROR to the Supreme Court of the First Judicial District of the State of Missouri.

McGinnis, of counsel for the defendant in error, moved the court to dismiss this writ of error, for want of jurisdiction. The action was originally instituted in the ninth judicial circuit of the state of Missouri, on a promissory note given by the defendant in error to the Commonwealth Bank of Kentucky, for the notes of that bank, to the amount of the promissory note. To this action the defendant pleaded several pleas ; and among them was one which presented the questions whether the charter of the Commonwealth Bank of Kentucky was a violation of the constitution of the United States, and whether the notes of the bank were not "bills of credit." The judgment of the circuit court was given in favor of the plaintiff, and the defendant removed the cause to the supreme court of Missouri by a writ of error. In the supreme court, the judgment of the circuit court was reversed ; the court deciding that the notes of the bank were "bills of credit," and prohibited by the constitution of the United States. The Bank of the Commonwealth prosecuted this writ of error, under the 25th section of the judiciary act of 1789.

Mr. McGinnis stated, that the only question in the case was, the constitutionality of the charter of the Commonwealth Bank. The supreme court of Missouri decided that it was void. This is not a case within the

¹ Walker v. Taylor, 5 How. 64.

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25th section of the judiciary act. The decision brought up from the state court was against the validity of the statute of Kentucky ; and it is only when the validity of a state law, as opposed to the constitution or laws of the United States, has been decided to be in favor of that validity, that the provision of the section in reference to such questions operates. If the supreme court of Missouri had decided in favor of the Kentucky law, the case could come to this court. This would be a case in which there might be supposed to have been an infraction of the constitution of the

*57] United States ; but there is no necessity for an *interference with the decisions of state tribunals, where there is no interference with the constitution. No principle can be urged which would justify such a construction of the judiciary act. The protection of the constitution of the United States was its object, and exclusively so.

Mr. McGinnis cited *Crowell v. Randall*, 10 Pet. 391 ; and the case referred to in the opinion of the court.

Crittenden, for the plaintiff in error, opposed the motion. He referred to the provision in the 25th section of the judiciary act, which authorizes writs of error in cases where is drawn in question the validity of a statute, and the decision is against it. The state of Kentucky, in the exercise of its reserved rights, had established the Bank of the Commonwealth. She claims under this authority, and relies on the clause of the constitution which declares all powers not granted by the constitution to be reserved. She says, that by the decision of the supreme court of Missouri, she is interrupted in the exercise of her reserved rights. She claims to have these rights guarantied to her, and their exercise protected by this court.

TANEY, Ch, J., delivered the opinion of the court.—A motion has been made to dismiss the writ of error in this case, upon the ground that this court has not jurisdiction. It appears from the record, that an action was brought in the circuit court of the state of Missouri, for the county of Calloway, by the plaintiff in error, in order to recover the amount due on a promissory note given by the defendant and others to the bank. The defendants, among other things, pleaded, "that the note sued on was made by the defendants to the plaintiffs, in consideration of the paper of the said Bank of the Commonwealth of Kentucky, and that the said paper was bills of credit, within the meaning of the constitution of the United States, issued on the credit of the state." The circuit court overruled this plea, and gave judgment for the plaintiffs. The defendants removed the case to the supreme court of the state, where the question above mentioned was again raised ; and it was then decided, that the notes of the bank were bills of credit, within the meaning of the constitution of the United States, and that the contract upon which the note in question was given was, therefore, void ; and upon that ground, the judgment of the circuit court was reversed, and judgment entered for the defendants. The point is, can this judgment of the state court be re-examined here ?

The question depends altogether upon the construction of the second clause of the 25th section of the act of 1789, which provides that the final judgment or decree of the highest court of law or equity in a state, in which a decision could be had, may be re-examined in this court, upon a writ of error, "where is drawn in question the validity of a statute of, or an author-

Bank of Kentucky v. Griffith.

ity exercised under any state, on the ground of their being repugnant to the constitution, *treaties or laws of the United States, and the decision is in favor of such their validity." Under this clause of the [*58 act of congress, three things must concur to give this court jurisdiction. 1. The validity of a statute of a state, or of an authority exercised under a state, must be drawn in question. 2. It must be drawn in question upon the ground that it is repugnant to the constitution, treaties or laws of the United States. 3. The decision of the state court must be in favor of their validity.

In the case before us, the validity of the statute of the state of Kentucky which chartered the Commonwealth Bank, and the authority exercised under that charter, were drawn in question in the state court; and they were questioned, upon the ground of their being repugnant to the constitution of the United States. But the decision was against their validity, and not in favor of it; and consequently, the third contingency which is necessary to give jurisdiction to this court has not arisen. In the case of *Briscoe v. Commonwealth Bank*, 11 Pet. 257, the decision of the state court was in favor of the validity of the statute. The party, therefore, who denied its validity, and alleged that it was repugnant to the constitution of the United States, was entitled to have that question re-examined in the supreme court. But it is otherwise, by the plain words of the law, when the decision of the state court is against the validity of the state statute, or the authority exercised under it.

The policy of this distinction is obvious enough. The power given to the supreme court by this act of congress was intended to protect the general government in the free and uninterrupted exercise of the powers conferred on it by the constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right was, therefore, given to this court, to re-examine the judgments of the state courts, where the relative powers of the general and state government had been in controversy, and the decision had been in favor of the latter. It may have been apprehended, that the judicial tribunals of the states would incline to the support of state authority, against that of the general government; and might, moreover, in different states, give different judgments upon the relative powers of the two governments, so as to produce irregularity and disorder in the administration of the general government. But when, as in the case before us, the state authority or state statute is decided to be unconstitutional and void, in the state tribunal, it cannot, under that decision, come in collision with the authority of the general government; and the right to re-examine it here is not necessary to protect this government in the exercise of its rightful powers. In such a case, therefore, the writ of error is not given; and the one now before us must be dismissed, for want of jurisdiction.

THIS cause came on to be heard, on the transcript of the record from the supreme court of the state of Missouri, holden at the town of Fayette, in the county of Howard, in and for the first judicial district of said state, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that this writ of error to the said supreme court be and the same is hereby dismissed, for the want of jurisdiction.

*COMMERCIAL AND RAILROAD BANK OF VICKSBURG, Plaintiff in error, v.
SLOCOMB, RICHARDS & COMPANY, Defendants in error.

Jurisdiction as to corporations.

An action was brought in the circuit court of Mississippi, against the Commercial and Railroad Bank of Vicksburg, Mississippi, by parties who were citizens of the state of Louisiana; the defendants pleaded in abatement, by attorney, that they were an aggregate corporation, and that two of the stockholders resided in the state of Mississippi; the affidavit to the plea was sworn to by the cashier of the bank, before the "deputy-clerk;" it was not entitled as of any term of the court; the plaintiffs demurred to the plea: *Held*, that the appearance of the defendants in the circuit court, by attorney, was proper; and that if any exceptions existed to this form of the plea, they should have been urged to the receiving of it, when it was offered, and were not causes of demurrer: also, that the circuit court of Mississippi had no jurisdiction of the case.

The artificial being, a corporation aggregate, is not, as such, a citizen of the United States; yet the courts of the United States will look beyond the mere corporate character, to the individuals of whom it is composed; and if they were citizens of a different state from the party sued, they are competent to sue in the courts of the United States; but all the corporators must be citizens of a different state from the party sued. The same principle applies to the individuals composing a corporation aggregate, when standing in the attitude of defendants, which does when they are in that of plaintiffs.¹

The act of congress, passed February 28th, 1839, entitled "an act in amendment of the acts respecting the judicial system of the United States" did not contemplate a change in the jurisdiction of the courts of the United States, as regards the character of the parties, as prescribed by the judiciary act of 1789, as that act has been expounded by the supreme court of the United States; which is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued.

ERROR to the Circuit Court for the Southern District of Mississippi. Cora A. Slocomb, Robert Richards and Romanzo W. Montgomery, styling themselves citizens of Louisiana, trading under the firm of Slocomb, Richards & Company, sued the president, directors and company of the Commercial and Railroad Bank of Vicksburg, styling them citizens of the state of Mississippi, living and residing in the southern district thereof, being a banking company, incorporated by the legislature of the state of Mississippi, located in the southern district aforesaid. The suit was upon a certificate of deposit for \$3541.34.

To the declaration of the plaintiffs, averring as above stated, the defendants put in the following plea: "The said defendants, by attorney, come and say, that this court ought not to have or take further cognisance of the action aforesaid, because they say, that they are a corporation aggregate, and were, at the time this suit was instituted, and yet so continue to be, and that the corporators, stockholders or company are composed of citizens of other and different states, to wit, that William M. Lambeth and *61] William E. Thompson, citizens of the state of Louisiana, *are now, and were at the time this suit was instituted, stockholders and corporators therein; and this," etc. The following affidavit was subjoined to the plea:

"James Roach, acting cashier for the Commercial and Railroad Bank of Vicksburg, the defendants in the above case, makes oath, and says, the above plea is true in substance and fact. J. ROACH."

"Sworn to, and subscribed before me, this 4th day of November 1839.
GEORGE W. MILLER, Deputy-clerk."

¹ See note to Hope Ins. Co. v. Boardman, 5 Cranch 57.

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To this plea, the plaintiffs demurred, and assigned the following special causes, to wit: 1. The said plea in abatement is not properly entitled of any term of this court. 2. The affidavit in support of said plea is not sufficient, nor is the same properly attested. 3. The matters set forth in said plea are not sufficient to abate the plaintiff's suit. The demurrer was sustained, and judgment rendered for the plaintiffs; the defendants prosecuted this writ of error.

Sergeant, for the plaintiffs in error, assigned as error in the judgment of the circuit court, the following points: 1. The alleged defect in the plea in abatement of the defendants below, and the want of a proper affidavit, and attestation of the plea, are not causes of demurrer. 2. If they are causes of demurrer, the plea was legal and sufficient; and if not so, the judgment of the circuit court should have been to answer over. 3. The causes assigned as sufficient to abate the plaintiff's suit, and which, being matter of general demurrer, did not require to be specially assigned, are not founded in law. On the contrary, the facts stated in the plea, and admitted by the demurrer, are sufficient in law to take away the jurisdiction of the court, and entitled the defendants to judgment. 4. That if the plea and affidavit were informal, still the facts stated in them, however and whenever appearing, were fatal to the jurisdiction; which cannot be maintained by consent, or by waiver of the parties, or either of them.

Mr. *Sergeant* contended, that the principal question in this case, whether all the members of a corporation aggregate should be citizens of the state in which the suit was brought, had been frequently decided by the court. The jurisdiction of the circuit courts of the United States, the circuit courts having limited jurisdiction, extended only to controversies between citizens of other states, and those of the state in *which the action was brought, [*62 so far as the law had an application to the case before the court. It has also been decided, that although a corporation cannot be considered a citizen of the state erecting it, yet the court will look behind its charter, and if it finds the corporators citizens of one state, will recognise the right of those corporators to sue in the circuit courts. But it will apply to them the same principles and rules which are applicable to all parties coming into the courts of the United States. All the corporators must be citizens of the state in which the suit is instituted, to give the court jurisdiction. Cited, *Strawbridge v. Curtiss*, 3 Cranch 267; *Bank of the United States v. Deveaux*, 5 *Ibid.* 61.

Nor did the appearance of the plaintiffs in error, by attorney, in the circuit court, deprive them of a right to except to the jurisdiction of the court. The action was against them, as an aggregate corporation, and there could be no appearance but by attorney.

The counsel for the defendants in error rely on the provisions of an act of congress passed on the 25th of February 1839, relating to the judicial system of the United States.

An examination of the provisions of that statute, and a fair construction of them, will satisfy the court that it was meant to apply only to parties who, under the judicial system, were properly parties to suits in the circuit court, who but might not have been served with process. The statute was not intended to change the character or the nature of the jurisdiction of the circuit

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courts of the United States. Nor could that statute operate in the case before the court; for the citizens of Louisiana who were members of the aggregate corporation sued by the defendants in error, would be affected by the judgment of the circuit court, if in favor of the plaintiffs below. The funds of the bank would be appropriated to pay the debt; and to those funds, as stockholders, they had the same right as any other of the corporators.

The objections to the exceptions of the plaintiffs below to the plea, and this affidavit, are left upon the points submitted to the court. Whatever might be the value of these objections, had they been urged to the receiving of the plea, they cannot be assigned as causes of demurrer.

Henderson, for the defendants, contended, that the objections to the jurisdiction of the circuit court had not been properly brought forward. A foreign minister may be sued, if he does not make the objection in a proper form. The magistrate or court before whom the suit has been brought, cannot know of his exemption, unless it shall be pleaded. It must be ascertained in a judicial form. Having omitted to plead the exemption, the jurisdiction is admitted. This is the principle which, by the rules of pleading, govern the case. 2 Cranch 240. The plea is defective because it *63] excepts to the jurisdiction of the *court, without the proper affidavit to sustain it. The affidavit should have been made by the persons who are alleged to have been improperly sued; and it should have been properly sworn to.

The act of congress of 1839 applies to this case, and gave the court jurisdiction. It provides for the absence of the parties who may not have been served with process: and allows the court to proceed without them, although the cause of action is joint. The objection, that it is not stated at what term the plea in abatement was filed, is valid; because as the rule is, that no such plea shall be received, after an appearance, the period when the plea was filed cannot otherwise be known. Courts are not disposed to sustain pleas in abatement. A court will not consider that the defendant sued were out of its jurisdiction, unless this shall be shown by proper pleading; and by this pleading in proper time. Cited, *Story's Plead.* pl. 3, 7. *Gould Plead.* 238, § 7; *Chit. Plead.* 475; *Chitty's Arch.* 688; 3 *Mason* 9.

BARBOUR, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the United States, for the southern district of Mississippi. It was an action on the case in *assumpsit*, brought by the defendants in error, citizens of Louisiana, against the plaintiffs in error. The defendants in the court below appeared by attorney, and pleaded to the jurisdiction of the court; averring in their plea, that they were a corporation aggregate, and that their corporators, stockholders or company, were composed of citizens of other and different states; to wit, that William M. Lambeth and William E. Thompson, citizens of Louisiana, were, at the time that the suit was instituted, and at the time of filing the plea, stockholders and corporators therein. The plaintiffs in the court below demurred to this plea, assigning specially several causes of demurrer, as follows: 1. That the plea was not properly entitled of any term of the court. 2. That the affidavit in support of the plea was not sufficient, nor was it properly attested. 3. That the matters set forth in the plea were not sufficient to abate the plaintiffs' suit. The court sustained the demurrer, and gave judgment

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against the defendants, for \$3575.54, in damages ; being the amount of the principal and interest of a certificate of deposit, on which the suit was brought, and for the costs. To reverse this judgment, this writ of error is brought.

In examining the correctness of the judgment of the court upon the demurrer, we throw out of consideration the first two causes assigned ; because, if there were any irregularity in the particulars stated, they could at most only be urged as objections to the receiving of the plea ; but could not be relied upon as grounds of demurrer ; the office of which is, to put in issue the legal effect of a plea, after it has been received.

The third cause assigned, which was, that the plea was not sufficient *to abate the plaintiffs' suit, raises the only question to be decided ; and that is, whether, upon the state of the parties, as appearing upon the record, the court had jurisdiction of the case. It will be observed, that the plaintiffs were citizens of Louisiana ; so averred to be in the declaration ; and two of the members of the corporation sued were also citizens of Louisiana. They are so averred to be, in the plea, and the demurrer admits the truth of this averment. The 11th section of the judiciary act of 1789 gives to the circuit courts of the United States jurisdiction in cases where "the suit is between a citizen of the state where the suit is brought, and a citizen of another state."

This court were called upon, at an early period, to construe this section of the judiciary act, in relation to the very question raised by the pleadings in this case. In the case of *Strawbridge v. Curtis*, 3 Cranch 267, they decided, that where there are two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States, in order to support the jurisdiction. And what is more particularly applicable to this case, in the case of the *Bank of the United States v. Deveaux*, 5 Cranch 61, this court decided, that a corporation aggregate, composed of citizens of one state, might sue a citizen of another state in the circuit courts of the United States ; that is, they, in effect, decided, that although the artificial being, a corporation aggregate, was not a citizen, as such, and therefore, could not sue in the courts of the United States, as such, yet the court would look beyond the mere corporate character, to the individuals of whom it was composed ; and if they were citizens of a different state from the party sued, they were competent to sue in the courts of the United States. But still, upon the principle of *Strawbridge v. Curtis*, all the corporators must be citizens of a different state from the party sued. And the doctrine of both these cases has ever since been held to be the law of this court. It is perfectly clear, that the same principle applies to the individuals composing a corporation aggregate, when standing in the attitude of defendants, which does when they are in that of plaintiffs.

The application of these doctrines to this case, would seem to be decisive of its fate ; unless there is something in other points which were argued at the bar to obviate their force. For it has already been stated, that the plaintiffs in the court below were citizens of the state of Louisiana, and two of the members of the corporation sued were also citizens of Louisiana ; so that some of the defendants being citizens of the same state with the plaintiffs, it follows, that although each of the plaintiffs was capable of

suing, yet each of the defendants was not capable of being sued, in the circuit court of Mississippi.

But it was contended at the bar, that whatever might have been the original ground of objection to the jurisdiction of the court, the *65] defendants had appeared by attorney; and that such an appearance waived all objection to the jurisdiction of the court. This is admitted to be a well-established rule, in pleas of this sort, in courts of general jurisdiction, where the plea is interposed by individual defendants. We deem it unnecessary, for the purposes of this case, to inquire, what would be the effect of an appearance by attorney, of an individual defendant, in pleading such a plea in the circuit courts of the United States, which are of limited jurisdiction. But we are clearly of opinion, that in the case of a corporation aggregate, no waiver of an objection to jurisdiction could be produced, by their appearing and pleading by attorney, because, as such a corporation cannot appear but by attorney, to say that such an appearance would amount to a waiver of the objection, would be to say, that the party must from necessity forfeit an acknowledged right, by using the only means which the law affords of asserting that right.

It was further contended, that all objection to the state of the parties in this case was obviated by the act of congress, passed February 28th, 1839, entitled, "an act, in amendment of the acts respecting the judicial system of the United States." The first section of that act provides, "that where in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer."

We consider the true construction of this act to be this: The 11th section of the judiciary act, after having prescribed the jurisdiction of the circuit courts, as it regards the character of the parties, by way of personal exemption, declares, "that no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ." Under the operation of this clause, many difficulties occurred in practice, in cases both in law and equity, in which, by the principles governing courts both of law and equity, it was necessary to join several defendants, some of whom were, and others were not, inhabitants of the district in which the suit was brought. The act of 1839 was intended to remove these difficulties, by providing, that the persons, not being inhabitants, or not found within the district, may either not be joined at all with those who were, or if joined, and they did not waive their personal exemption, by a voluntary appearance, the court may go on to judgment or decree against the parties properly before it, as *66] if the others had not been joined. *But it did not contemplate a change in the jurisdiction of the courts, as regards the character of the parties, as prescribed by the judiciary act, and as expounded by this court; that is, that each of the plaintiffs must be capable of suing, and

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each of the defendants capable of being sued ; which is not the case in this suit ; some of the defendants being citizens of the same state with the plaintiffs.

There is another reason why this act of 1839 cannot apply to this case. It expressly declares, that the judgment or decree shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer. Now, the defendants in this case being a corporation aggregate, any judgment against them must be against them in their corporate character ; and the judgment must be paid out of their corporate funds, in which is included the interest of the two Louisiana stockholders ; and consequently, such a judgment must of necessity prejudice those parties, in direct contravention of the language of the law.

We are of opinion, that the judgment of the circuit court was erroneous, in sustaining the plaintiffs' demurrer to defendants' plea : it is, therefore, reversed, and the case is remanded to the circuit court, to be proceeded in according to law.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of Mississippi, and was argued by counsel : On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, with costs ; and that this cause be and the same is hereby remanded to the said circuit court, with directions to proceed therein according to law and justice, in conformity to the opinion of this court.

*HENRY A. SUYDAM and WILLIAM BOYD, Plaintiffs in error, v. [*67
ROBERT BROADNAX and ISAAC NEWTON, Administrators of
DAVID NEWTON, deceased, Defendants in error.

Jurisdiction.—Insolvency.

The plaintiffs, merchants of New York, instituted a suit in the circuit court of Alabama, against the administrators of the maker of a note, dated in New York, and payable in New York. The act of the assembly of Alabama provides, that the estate of a deceased person, which is declared to be insolvent, shall be distributed by the executors or administrators, according to the provisions of the statute, among the creditors ; and that no suit or action shall be commenced or sustained against any executor or administrator, after the estate of the deceased has been represented as insolvent, except in certain cases not of the description of that on which this suit was instituted : *Held*, that the insolvency of the estate, judicially declared under the statute of Alabama, was not sufficient in law to abate a suit instituted in the circuit court of the United States, by a citizen of another state, against the representatives of a citizen of Alabama.¹

¹ The law of a state limiting the remedies of its citizens, in its own courts, cannot be applied to prevent the citizens of other states from suing in the courts of the United States, in that state, for the recovery of any property or money there, to which they may be legally or equitably entitled. *Union Bank v. Jolly's Administrators*, 18 How. 503, 507. The juris-

diction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power. *Hyde v. Stone*, 20 Id. 170 ; *Payne v. Hook*, 7 Wall. 430. In all cases where a general right is conferred by statute,

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The exceptions in the sixth section of the law of Alabama, in favor of debts contracted out of the state, prevent the application of the statute, or its operation, in a case of a debt originating in and contracted by the deceased, out of the state of Alabama.

A sovereign state, and one of the states of this Union, if the latter were not restrained by constitutional prohibitions, might, in virtue of sovereignty, act upon the contracts of its citizens wherever made; and discharge them, by denying the right of action upon them in its own courts; but the validity of such contracts as were made out of the sovereignty or state, would exist and continue everywhere else, according to the *lex loci contractus*.

The constitutional and legal rights of a citizen of the United States, to sue in the circuit courts of the United States, do not permit an act of insolvency, completely executed under the authority of a state, to be a good bar against a recovery upon a contract made in another state.

The 11th section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit courts of the United States; and gives to the circuit courts "original cognisance, concurrent with the courts of the several states, of all suits of a civil nature, at common law and in equity." It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies co-extensive with that right; these remedies would not be so, if any proceedings, under an act of state legislation, to which the plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court.

CERTIFICATE of Division from the Circuit Court of the Southern District of Alabama. An action was instituted in the circuit court of Alabama, by Henry A. Suydam and William Boyd, against the defendants, as administrators of David Newton, on a promissory note given by him to the plaintiffs.

On the trial of the cause, the following questions arose, on which the judges of the circuit court were divided, and the same were certified to this court. 1st. Is the plea, that the estate of the said decedent is insolvent, sufficient in law to abate the said action? 2d. If the said plea be sufficient in law to abate said action, can the circuit court of the United States for the district aforesaid, refer said cause for adjudication and final settlement *68] to a board of commissioners, *to be appointed by a county court in one of the counties in the state of Alabama, in pursuance of an act of the legislature of the said state?

Curtis, for the plaintiffs, presented the following points:—1. The law of Alabama is no defence to the action, because it is in conflict with a law of the United States. 2. The law of Alabama is void, because it is repugnant to the clause in the tenth section of the eleventh article of the constitution of the United States, which inhibits any state from passing "any law impairing the obligation of a contract." 3. Even if the law of Alabama be admitted to be valid, it is no defence to the action.

On the first point, that the law of Alabama is no defence to the action, because it is in conflict with a law of the United States, Mr. Curtis said: The plaintiffs, residing in New York, sued the defendants, residing in Alabama, as administrators of a deceased person. For the defence, a law of that state is relied on, the clause of which, applicable to the case, is as follows: "Nor shall any suit or action be commenced or sustained against him" (*i. e.* an executor or administrator), "after the estate of the

it can be enforced in any federal court having jurisdiction of the parties; and cannot be withdrawn from the cognisance of such federal

court, by any provision of state legislation, that it shall only be enforced in a state court. *Railway Co. v. Whitton*, 13 Wall. 286.

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testator or intestate is represented insolvent." Two exceptions are made, which have nothing to do with the present case. Aikin's Digest (2d Edit. 1836) 152, 664.

The second section of the third article of the constitution of the United States extends their judicial powers to controversies between citizens of different states. The judiciary act of 24th September 1789, § 11 (1 U. S. Stat. 78), gives the circuit courts of the United States, original cognisance, concurrent with the courts of the several states, of certain classes of cases, among which are cases in which "the suit is between a citizen of the state where the suit is brought, and a citizen of another state;" and in which "the matter in dispute exceeds, exclusive of costs, the sum or value of \$500." It is admitted, that the present case has both these requisites for jurisdiction on the part of the federal court. The effect, then, of the defence, if successful, would be to establish the doctrine, that it is competent for a state legislature, under the constitution of the United States, to pass a law to oust a court of the United States of a jurisdiction which that constitution had conferred on it. The mere statement of such a proposition is, one would think, its conclusive refutation.

The effect claimed for the law of Alabama, would be to give a state exclusive jurisdiction of cases in which, by the constitution and laws of the United States, and the judicial expositions of that constitution and those laws, the state has no jurisdiction at all. "For," the court said, "in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision, on the *same subject, those of the Union being 'the supreme law of the land,' are of paramount authority; [*69 and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield :]" *per* STORY, J., in *Houston v. Moore*, 5 Wheat. 49-50. This passage occurs, it is true, in the opinion of a judge who dissented from the judgment of the court in the particular case; but the difference between the judges was, not as to the principle (for it appears never to have been, as Judge STORY says, "seriously doubted"), but as to its application to the case before them. In the present case, no such difference can exist. The law of the United States says, that the circuit court shall try it; the law of Alabama says, that the circuit court shall not try it. The conflict between the two statutes is direct and palpable. It is for the supreme court to say which is to prevail.

It may not be amiss, on this point of concurrent powers, to cite the principle laid by Chancellor KENT, after analyzing the case of *Houston v. Moore*, and other cases, in which the subject had been judicially examined: "It would seem, therefore, that the concurrent power of legislation in the states, is not an independent, but a subordinate and dependent, power, liable in many cases to be extinguished, and in all cases to be postponed, to the paramount or supreme law of the Union, wherever the federal and the state regulations interfere with each other." 1 Kent's Com. 394, 388-93. After referring to the doctrine of the Federalist (No. 82), that in all cases of concurrent jurisdiction, an appeal would lie from the state courts to the supreme court of the United States; that without such right of appeal, the concurrent jurisdiction of the state courts, in matters of national concern would be inadmissible, because, in that case, it would be inconsistent with the authority and efficiency of the general government; and after analyzing several

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cases, Chancellor KENT says (1 Com. 403), that if the state courts "voluntarily entertain jurisdiction of cases cognisable under the authority of the United States, they assume it upon the condition, that the appellate jurisdiction of the federal courts shall apply." This proposition is irreconcilable with the assumption of the Alabama law, that the federal courts shall have no jurisdiction at all in the present case. The same learned judge lays it down as a principle, and sustains it by abundant authority, that "no state can control the exercise of any authority under the federal government." (1 Kent's Com. 409-12.) Yet this is exactly what the state of Alabama seeks to do here. In *United States v. Fisher*, 2 Cranch 397, the supreme court emphatically assert "the supremacy of the laws of the United States, on all subjects to which the legislative power of congress extends."

In a case in which the states of Virginia and Kentucky had made a compact, by the terms of which, certain rights to land were to be *finally
 *70] decided according to the laws of Virginia, the supreme court said: "The constitution of the United States, to which the parties to this compact had assented, gave jurisdiction to the federal courts in controversies between citizens of different states. The same constitution vested in this court an appellate jurisdiction, in all cases where original jurisdiction was given to the inferior courts; with only such exceptions and under such regulations as the congress shall make. Congress, in pursuance of the constitution, has passed a law on the subject, in which the appellate jurisdiction of this court is described in general terms, so as to comprehend this case; nor is there in that law any exception or regulation which would exclude the case of a *caveat* from its general provisions. If, then, the compact between Virginia and Kentucky was even susceptible of the construction contended for, that construction could only be maintained, on the principle that the legislatures of any two states, might, by agreement among themselves, annul the constitution of the United States. The jurisdiction of the court being perfectly clear, it remains to inquire, which of the parties has the better right." *Wilson v. Mason*, 1 Cranch 91-2. See also, Sergeant's Constitutional Law 44, 275-278, 287-90 (2d Edit.), and the cases there cited.

The laws of the several states, as to rights, furnish rules of decision for the federal courts, under certain qualifications; but as to remedies, they have no binding force in these courts. *Campbell v. Claudius*, Pet. C. C. 484. The statutes of limitation of the different states do not bind the United States, in suits in courts of the United States; and cannot be pleaded in bar in a suit by the United States against individuals. *United States v. Hoar*, 2 Mason 311. "It has been generally held, that the state courts have a concurrent jurisdiction with the federal courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article. If the words, 'to all cases,' give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of congress, in cases arising under the constitution, laws and treaties of the United States." *Cohens v. Virginia*, 6 Wheat. 397.

It has already been shown, that the conflict of the law of Alabama with the law of the United States, covering this case, makes the grant of juris-

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diction in the latter to the federal court a grant of exclusive jurisdiction, *quoad* this case. The judiciary act of the 24th September 1789, in § 34, declares (1 U. S. Stat. 92), that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. *The case at bar is the very exception. It is a suit for which a statute of the United States has "otherwise" provided; and far [*71 "otherwise" than the law of Alabama has done; for the federal law says expressly, that the suit may be brought, and the state law says expressly, that the suit shall not be brought. This 34th section of the judiciary act of 1789 has no application to the practice of the courts, nor in any manner calls upon them to pursue the various changes which may take place, from time to time, in the state courts, with respect to their processes, and modes of proceeding under them. *United States Bank v. Halstead*, 10 Wheat. 54.

So far as the act of congress of the 8th May 1792 (1 U. S. Stat. 275), called the "process act," perpetuating the former act of 29th September 1789 (*Ibid.* 93), adopts the state laws as regulating the modes of proceeding in suits at common law, the adoption is expressly confined to those in force in September 1789. The act of congress does not recognise the authority of any laws of this description which might be afterwards passed by the states. *Wayman v. Southard*, 10 Wheat. 41. If a state law cannot affect the course of causes in the federal courts, after they have passed to judgment, how can it prevent them, when regularly prosecuted under a law of the United States, from passing the judgment?

On the second point, it was argued, that the law of Alabama is void, because it is repugnant to the clause in the tenth section of the first article of the constitution of the United States, which inhibits a state from passing "any law impairing the obligation of contracts." This law manifestly impairs the obligation of a contract, because it destroys the creditor's remedy *in toto*. It disables him from bringing a suit at all, and makes him an outlaw. See, as to this point, *Sturges v. Crowninshield*, 4 Wheat. 122; *McMillan v. McNeill*, 4 Wheat. 209; *Ogden v. Saunders*, 12 *Ibid.* 213; 1 Kent's Com. 419.

On the third point, Mr. Curtis contended, that, even if the law of Alabama be admitted, for the sake of argument, to be valid, it is no defence to the action. The words of the law are, "nor shall any suit or action be commenced or sustained against him, after the estate of the testator or intestate is represented insolvent." Whether the words "commenced" and "sustained" are, as here used, synonymous or not, is a question on which philologists may differ. Dr Johnson gives seven definitions of the word "sustain;" the first of which is, "to bear; to prop; to hold up:" the second, "to support; to keep from sinking under evil;" the third, "to maintain; to keep;" and the fourth, "to help; to relieve; to assist." Mr. Richardson, on the contrary, says that "*sustinere*," from which he derives it, means, not to hold up, but to hold or keep under, as well as to support; and defines "sustain" as meaning "to bear or *carry; to bear, to suffer, to endure." These are his only senses of the word; and the [*72 coincide with the remaining three given to it by Dr. Johnson. None of Richardson's definitions of the word "sustain," can, it is clear, help out the

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defence, so far as it rests on that word in the law. It is a word generally used loosely in statutory and judicial language; and it has never been represented, that the legislature of Alabama is more remarkable than other legislatures for critical elegance or precision. The probability is, that the word "sustained" was thrown into the law in question, as a mere pleonasm. If so, the law prohibits such suits only against an executor or administrator as are commenced after the estate of the testator or intestate is represented insolvent. Now, in the case at bar, the representation of insolvency was after the suit, instead of the suit being after the representation. The suit, therefore, was a proper one, even under the law of Alabama.

But let it be conceded, that the word "sustained" has a substantive meaning in the law, and bars actions properly "commenced," on a representation of insolvency made *pendente lite*; still the law would be inoperative to oust a jurisdiction which had once vested. "Where," says Chief Justice MARSHALL, "jurisdiction of the federal court has once attached, no subsequent change in the relation or condition of the parties in the progress of the cause will oust the jurisdiction. The strongest considerations of utility and convenience require, that the jurisdiction once vested, the action of the court should not be limited; but that it should proceed to make a final disposition of the subject." *United States v. Myers*, 2 Brock. 516. This principle has been repeatedly announced by the supreme court of the United States. See *Morgan's Heirs v. Morgan*, 2 Wheat. 290, 297; *Mollan v. Torrance*, 9 Ibid. 537; *Dunn v. Clarke*, 8 Pet. 1; *Clarke v. Mathewson*, 12 Ibid. 164.

WAYNE, Justice, delivered the opinion of the court.—This case has been sent to this court upon a certificate of division of opinion between the judges of the circuit court of the southern district of Alabama. Suydam & Boyd, partners in trade, citizens of the state of New York, sue the defendants, as administrators of David Newton, upon a promissory note given by the intestate to the plaintiff, dated New York, September 1st, 1835, payable in twelve months. The defendants, as we are left to gather from a most imperfect record (for the pleadings, except the declaration, are not given), plead in abatement of the suit, that the estate represented by them has been declared, under proceedings of a statute of Alabama, to be insolvent; and in such case, that they are not liable to be sued. The judges of the circuit court were opposed in opinion upon the question, "Is the plea that the estate of the said deceased is insolvent, sufficient in law to abate the said action?"

The statute of Alabama will be found in Aikin's Digest of the
 *73] ^{*Laws of Alabama 151.} The second section of it declares, that the estates of persons altogether insolvent shall be distributed among the creditors in proportion to the sums respectively due, after the payment of debts due for the last sickness and necessary funeral expenses. For the purpose of ascertaining such insolvency, the executor is permitted to exhibit to the orphans' court an account and statement of the effects of the estate, including in it also the lands, tenements and hereditaments of the testator or intestate; and if it shall appear to the orphans' court that such estate is insolvent, then, after ordering the lands, tenements and hereditaments of

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the testator or intestate to be sold, the court shall appoint two or more commissioners, with power to receive and examine the claims of the creditors of the estate ; and the commissioners are directed to give notice of the times and places of their meeting, by notifications posted up in such public places, and in such newspapers, as the orphans' court, or chief justice thereof, may direct. Six months, and not more than eighteen months, shall be allowed by the court to creditors to bring in and prove their claims before the commissioners. The commissioners, at the end of the time limited, are to make a report, on oath, to the orphans' court, of all the claims which have been laid before them, with the sums allowed by them on each respective claim. The court then shall order the residue of the estate, personal and real (the real estate being sold according to law) to be paid and distributed among the creditors whose claims have been allowed by the commissioners, in proportion to the sums respectively due. Provision is then made, either at the instance of a creditor, or executor or administrator, either being dissatisfied with the report on a particular claim, under an order of the orphans' court, to refer that claim to a court of referees, whose report upon it, when returned to the orphans' court, and approved, is declared to be final and conclusive. And it is further declared, that no suit or action shall be commenced or sustained against any executor or administrator, after the estate is represented insolvent, except in certain cases not necessary to be now noticed. But the statute further provides for the liability of the executor or administrator to the creditors, for their respective shares in the distribution; and then declares, that the claims of creditors which have not been put before the commissioners, within the time limited, or which have not been allowed in the other modes directed by the statute, shall be for ever barred; unless such creditor shall find other estate of the deceased, not inventoried or accounted for by the executor or administrator, before distribution.

Is, then, the insolvency of the estate, judicially declared under the statute, sufficient in law to abate the suit of the plaintiff? We think such an insolvency cannot abate the action upon which this division of opinion has been certified to this court. The statute itself contains a provision which meets the question. The sixth section declares, that "all claims against the estates of deceased persons shall be presented to the executor or administrator, within eighteen months after the same shall have accrued," "or within eighteen months after letters have been granted, and not after; and all claims not presented within that time, shall be for ever barred from recovery;" but excepts, among other exceptions, debts contracted out of Alabama. Now, if an estate may be declared insolvent under the statute, in less than the longest time allowed to creditors to present their claims; and creditors, for debts contracted out of the state, are not limited to that time to present their claims; it follows, as a necessary consequence, that an estate having been declared to be insolvent, within the shorter time, cannot exclude such creditor from maintaining a suit against the executor or administrator. And in cases of insolvency, declared after eighteen months, creditors of debts contracted out of the state cannot be included in the exclusion from the right to sue; for no time is limited for such claims to be presented; and in an action to enforce them, a recovery can only be prevented by such defences as would prevail in any other suit. We think this a conclusive interpretation of the sixth section; and on this

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ground, that the plea of the estate being insolvent is not sufficient to abate this action.

But if the sixth section was not in the statute, our opinion would be the same, from the rule which must be applied to interpret such a statute. Statutes are mandatory, except of the established rules for the interpretation of them. This is a statute which, by the exemption it gives to executors and administrators from suit, would seem to imply a denial to creditors of the intestate the right to sue, without respect to the foreign country, or state in our own Union, where the debt was contracted. It is a general statute, without a direct application to contracts made out of Alabama; and its construction cannot be extended to such contracts. *Ratio est, quia statutum intelligit semper disponere de contractibus factis intra et non extra territorium suum.* Casaregis, Disc. 130, § 14, 16, 20, 22. A sovereign state, and one of the states of the Union, if the latter were not restrained by constitutional prohibitions, might, in virtue of sovereignty, act upon the contracts of its citizens, wherever made, and discharge them, by denying a right of action upon them in its courts. But the validity of such contracts as were made out of the sovereignty or state, would exist and continue everywhere else, according to the *lex loci contractûs*. This shows the reason for and force of the rule just given; and it may be laid down as a safe position, that a statute discharging contracts or denying suits upon them, without the particular mention of foreign contracts, does not include them.

We do not mean, however, to decide this question solely by the interpretation which has been given to the statute. It may be put upon other grounds, making our conclusion equally certain. They are such as are connected with the constitutional and legal rights of the plaintiffs to sue in the circuit courts of the United States; and upon the law which, under our system, does not permit an act of insolvency, completely executed under the authority *of one state, to be a good bar against the recovery *75] upon a contract made in another state. The 11th section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit court of the United States; and gives to the circuit court "original cognisance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, and in equity," &c. It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies co-extensive with these rights. These remedies would not be so, if any proceedings under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court. The division of opinion too, as it is presented in the record, is brought within the decisions of this court, in *Sturges v. Crowninshield*, 4 Wheat. 122, and *Ogden v. Saunders*, 12 Ibid. 213. It must be remarked, however, that the statute of Alabama is one for the distribution of insolvent estates, not liable to the objections of a general law; and is only brought under the cases mentioned, by an attempt to extend its provisions to a citizen of another state.

In *Sturges v. Crowninshield*, it is said, "Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are affected, are entitled to a hearing. Hence,

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any bankrupt or insolvent system professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt. But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed, is to prostrate his rights; and on the subject of those rights, the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate." In *Ogden v. Saunders*: "A bankrupt or insolvent law of any state, which discharges both the person of the debtor and his future acquisitions of property, is not a law impairing the obligation of contracts, so far as respects debts contracted subsequently to the passage of the law. But a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another state, in the courts of the United States; or of any other state than that where the discharge was obtained."

Though this is a statute intended to act upon the distribution of insolvent estates, and not a statute of bankruptcy; whatever exemption it may give from suit to an executor or administrator of an insolvent estate, against the citizens of Alabama, a citizen of another state, being a creditor of the testator or intestate, cannot be acted upon by any proceedings under the statute, unless he shall have voluntarily made himself a party in them, so as to impair his constitutional and legal right to sue an executor or administrator in the circuit court of the United States. Let it then be certified to the circuit court of the United States for the southern district of Alabama, as the opinion of this court, *that the plea that the estate of the decedent is insolvent, is not sufficient in law to abate the plaintiffs' action. [*76]

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of Alabama, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that "the plea that the estate of the said decedent is insolvent, is not sufficient in law to abate the plaintiffs' action." Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said circuit court accordingly.

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Appellees.

Specific performance.

A decree for a specific performance of a contract to sell lands, refused, because a definite and certain contract was not made; and because the party who claimed the performance had failed to make it definite and certain on his part, by neglecting to communicate by the return of the mail conveying to him the proposition of the vendor, his acceptance of the terms offered. *Eliason v. Henshaw*, 4 Wheat. 225, cited, and the principles of the decision re-affirmed. If it be doubtful, whether an agreement has been concluded, or is a mere negotiation, chancery will not decree a specific performance.

APPEAL from the Court of Appeals for the Territory of Florida. The case is fully stated in the opinion of the court.

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The cause was argued by *Coxe* and *Webster*, for the appellant ; and by *Jones* and *Crittenden*, for the appellees.

CATRON, Justice, delivered the opinion of the court.—In October 1825, William Harris, of Montgomery, Alabama, made his will, devising to his two sons, William and Stephen, the tract of land in controversy, lying on Lake Jackson, in Florida. Stephen and William, at their father's death, were both minors ; and William soon after died, leaving two brothers and three sisters, who are his heirs ; and two of whom were infants when this bill was filed, and two of them married women. The land was unimproved and undivided. In the fall of 1835, William A. Carr, the complainant desired to purchase the land, and applied to Stephen W. Harris for the purpose, by letter ; he, Carr, residing in Georgia. The letter of Carr, opening the correspondence, is not in the record, but the answer to it is sufficiently explanatory. The answer is dated August 17th, 1835 ; in which Stephen W. Harris says, his father left the land to his young brother and himself, that his brother had died long since, and he had just come of age, and was entitled to half the land, which could be divided at any time ; "and my half," says he, "is for sale, but it has first to be divided ; my price for that is ten dollars per acre." "The remaining half is owned by the brother and sisters of said brother, and I believe they are willing to sell, and their price, I expect, is ten dollars. Before any part of the land, short of the whole tract, could be sold, it would first have to be divided ; the whole could be sold so, and our price is ten dollars."

The next letter from Stephen W. Harris to complainant, is dated December 15th, 1835, acknowledging the receipt of one, the day before, from complainant, requesting to be informed of the quantity of the land. *78] The answer stated it to be 2131 $\frac{1}{4}$ acres ; and proposed to take Carr's offer for it, with interest on the last note, having two years to run. On January 2d, 1836, Harris acknowledged the receipt of another letter from Carr, dated the 25th December, preceding. "I have," says he, "come to the determination to sell you the land, on the terms you mentioned : " and then asks to be informed when and where they shall meet to make the necessary arrangements. The letter of Carr of the 25th December, referred to, offers to exchange some lands of his in Georgia (which, he says, he had previously described), rated by him at \$20,000, for the Florida lands, he giving \$3000 difference ; or, he would make the same offer he had previously done. What this offer was, appears by Harris's letter of the 16th January 1836 ; and as this letter is the conclusion of the correspondence, so far as Harris was concerned, and is the principal evidence relied on to establish the agreement, it becomes necessary, for the purposes of its proper understanding, and to ascertain the sense in which the parties understood it, to set it forth, together with the answers to it, of the 3d and 19th of February.

"MR. WILLIAM A. CARR.

Montgomery, January 16th, 1836.

"Sir :—Yours of the 12th instant is just received, and in reply have only to remark, that I will accede to your first proposition, as stated in my last letter : that is, one-third cash, the balance in two equal instalments, with a mortgage on the land—the last two payments to be made in cash—and as all the heirs live in the neighborhood of this place, it will be the only place

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where we can conveniently meet to close the bargain. I wish to know your decision *per* return mail, as I have three other offers for the land, and can sell it immediately, if you do not wish to take it."

"MR. STEPHEN W. HARRIS.

Athens, February 3d, 1836.

"Dear Sir:—Yours of the 16th January I received upon my return from Augusta, and according to your request, hasten to answer it, and for answer say, that I am still as desirous as ever of taking the land, and have considered myself bound to you for the money, and you as equally bound to me for the title to the land; but as there was, in my mind, at least, some doubt to which of my propositions you had acceded, I thought it best to write again, and be definitely informed on that subject, for the reasons stated in my last. It will be out of my power to go to Montgomery, as my family is sick; my wife, who has been confined, took cold, by leaving her room too soon after her confinement, and upon my arrival at home, found her quite sick; although better, is still too unwell for me to leave home just at this time; and our court commencing here next week, I shall have to remain until that is over; then I am *compelled, if my wife's health permits, to go immediately to Florida, as you have, no doubt, heard [*79 of the distressing situation of the country there, in consequence of the Indian hostilities; so you will have to get all the parties interested in the land together, which I suppose you can easily do, as you say they all live in the neighborhood, and have the titles perfected to me; and in doing so, the titles must be conjointly by all the heirs interested in the land, made and executed; and those who have families, their wives must assign over and relinquish their right of dower to the same; and when it is, that is, the title, properly executed, one of you can carry it or send it to me, or some agent at Tallahassee, and receive the first payment for the same, and my notes for the balance of the purchase-money, and the mortgage on the land, which suits me better than personal security; and in order that the business may be more properly executed, yourself and Judge Field had better be in Florida, for I shall require the boundaries of the land to be defined, so that I may know where the land lies, and when I am on my own land; as well as avoid getting on any of my neighbors' land. Will you be pleased to state what are the offers made you, and by whom, as you say in your last letter, you "have three other offers for the land," be good enough to state explicitly by whom they are made, what is the amount of each offer, and the payments. I ask this, as it cannot now make any difference to you, as I consider this matter closed between us; in other words, I consider the trade as made between us, which puts the land entirely out of the market. Any further communication between us will have to be sent to me to Tallahassee, Florida, as the mail communication between this and Montgomery, is so uncertain, that an answer would not reach here, until I should be gone to Florida. If you would prefer to remain at home, until you know certainly when I would be in Florida, I will write, on my arrival there, to you, and inform you when to meet me or go on there; the latter plan will, perhaps, be more desirable to you. I must here inquire, if any part of this tract has been taken off or sold to any person, as I have understood by some, it contained 2300, and by others, 2400 acres; but you always told me in our cor-

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respondence you would not divide it. Shall I hear from you at Tallahassee, as an answer would reach me there by the time I reach there?"

"MR. STEPHEN W. HARRIS.

Macon, February 19th, 1836.

"Dear Sir:—You will perceive by the date of my letter, I am thus far on my way to Florida, where, if no accident prevents, I shall reach there in the course of five days more, where I hope to see you and have our business brought to completion, where I can pay you the first payment, most of which I have had for some time, and take a title to the land. I have been delayed starting as early as contemplated, from circumstances entirely beyond my control; but soon, now, I hope, I shall be able to comply, *80] on my part, and *hope, ere this, you have received my last letter, and had the title completed according to directions, viz., to have all the heirs interested in the land to join you in the title, and those who have wives, to have them, their wives, to assign over and relinquish dower to the same; and you can start for Tallahassee as soon as you please."

The letter of Harris, when taken in connection with the former letters, has no ambiguity in it; he was acting not for himself only; but a sister and a brother, without any express authority from them; he could have none such from three of the joint owners—two infants and one a *feme covert*. There was, therefore, only one probable way in which the bargain could be closed; that is by a title-bond or deed, on the part of Stephen W. Harris, his brother and brother-in-law; the married adult sister joining in the deed, should one be made, and a covenant by others, as sureties, that the infant heirs should convey when they came of age. This would have been a very responsible suretyship, and not at all likely to have been undertaken by others than the family or neighbors of the parties; and hence, at Montgomery, was the only place (in the language of the letter of the 16th January) where the bargain could be conveniently closed; indeed, it was the only place where there was the slightest probability of closing at all.

It is obvious, Stephen W. Harris had carried on the correspondence upon his own judgment, without consultation with most of the other defendants, as to details; under the general understanding in the family, that they would take for their portion of the land the same price he saw proper to take for his. In the correspondence, the price and times of payment were stated; and it was required that a mortgage should be given on the land, for the last two annual instalments; but what other security would be required, was left open; so it was left open, what security would be given to Carr for the title. Where and how it should be made, was the great difficulty in closing the agreement. So far as the infant sisters were concerned, it was a difficulty that Stephen W. Harris had probably not seriously thought of; and was first met with, when he set about making deeds in pursuance of the complainant's letter; with which Harris found it impossible to comply. He was taught by experience, what would at first have prevented most men of the age and business habits from proposing to contract for the sale of the lands of infant sisters, who would probably marry before

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they became of age ; and if the land should increase in value, their husbands would refuse to sanction the contract.

But was the letter of the 16th of January an agreement on behalf of Stephen W. Harris ? Complainant's purpose was to establish a cotton farm, or to procure lands fit for such an establishment. He obviously did not wish to purchase lands in an undivided state ; nor did he make any proposition to purchase Stephen W. Harris's undivided interest ; it would have been unfit for occupation in this *condition. The proposition was to purchase the whole ; nor did Stephen W. Harris offer to sell less [*81 than the whole, before a partition should be made between him and his sister and brother. The idea of incumbering the title of the latter with a tenant in common, in possession, and cultivating the land in an undivided state, was, of course, rejected by Mr. Harris ; so he distinctly informed Mr. Carr.

The idea of a partial sale and purchase not entering into the contemplation of either party, we must construe the letter of the 16th of January in reference to this undoubted intention. Mr. Carr was bound to know that the statute of frauds was in force in Florida, and, no doubt, did know the fact ; we take it for granted he did, and that the agreement for the sale of the land must be in writing, signed by the parties to be charged. How then was it possible he could understand the letter of the 16th of January to be a complete and concluded agreement, even had it been simply accepted ? He is told, all the heirs reside in the neighborhood of Montgomery, and in effect, that it is the only place where they can meet to close and conclude the bargain. Now, if the bargain was already made, as the bill assumes, why meet to close it ? The truth is prominently apparent, from the face of the letter, what the intention of Harris was ; and nothing but the serious aspect given to it by the pleadings and arguments, would have induced the court to explain this note of a few lines, which, it must be admitted, is almost as likely to be obscured, as elucidated, by the attempt. We think no man of ordinary capacity could have been so far mistaken, as to believe the heirs of William Harris bound by the letter of the 16th of January ; nor even that Stephen W. Harris was bound thereby ; the object of the purchaser and vendor being a joint sale, and that only ; the owners of four-tenths of the estate being no parties to the letter ; two of them infants, and another a married woman, who were incapable of assent, and gave none in fact, so far as this record furnishes any evidence. We, therefore, think it clear, that this was merely a treaty for a sale and purchase of the land, not perfected into an agreement (11 Ves. 599) ; and that the letter does not import to be a contract. 2 Sim. & Stu. 194.

But suppose, the letter of the 16th January had bound Stephen W. Harris, and if it was possible, under the circumstances, to compel him to partial performance, so far as he had title ; what effect did the letters from complainant to him of the 3d and 19th February, have on that of the 16th January ? On the 3d of February, nineteen days after the proposition was made in the letter of the 16th of January (and which demanded an answer by return of mail), the complainant replied ; not that he accepted the proposition as made (an indispensable part of which was that he should immediately come to Montgomery, and there close the bargain) ; but that his family was sick ; that he had a court to attend ; then, if his wife's health permitted, he

had to go to Florida ; and of course, could not come to Alabama at all ; and "so," says he, "you will have to get all the parties interested in the land *82] *together, which I suppose you can easily do, as you say they all live in the neighborhood, and have the titles perfected to me ; and in doing so, the titles must be conjointly by all the heirs interested in the land, made and executed ; and those who have families, their wives must assign over and relinquish their right of dower." And then complainant instructs Stephen W. Harris to send or bring the deed to Tallahassee, to complainant, or to some agent of his. He also requires, that the boundaries of the land shall be defined ; and concludes by asserting, that he deems the agreement closed, and the land out of the market. The first payment complainant proposed to make at Tallahassee, in Florida ; and there to execute the contract on his part, by giving his notes for the two remaining instalments, and a mortgage on the land.

The additions to this acceptance of the proposition of the 16th January, are so numerous and important, as to hardly need comment ; when it is recollected, that complainant was dealing for the property, in part, of infants and married women. It was impossible, a conjoint deed could be executed ; three of the parties had no power to make such a deed ; and complainant required a conjoint one by all the heirs interested in the land, and this made and executed before he would undertake to comply with his part of the proposed agreement. Furthermore, it was to be made in Alabama ; there signed, sealed and witnessed, and then to be delivered in Florida. The infants, of course, could only act in receiving the money, by guardian ; of course, the guardian in Alabama might well question his authority in Florida. That the land should be defined, was also a change ; but whether amounting to a rejection of the proposition of the 16th of January, was there no other objection to the acceptance, we shall not stop to inquire.

But if nothing else stood in the way, the time of the acceptance is conclusive of the complainant's claim. The letter of the 16th January desired an answer by return of mail ; why, is distinctly stated. Three other propositions to purchase the land had been made. No answer came by return of mail ; and not until twenty days after, was an answer put in the mail ; and by that the parties were directed to meet complainant at Tallahassee, not immediately, but presently, of which he was to give them information. By the terms of the acceptance, the time of meeting rested in the discretion of the complainant. He claimed, by his letter of the 3d February, the contract to have been concluded ; and therefore, could, according to his construction of it, take his own time to order the respondents to meet him in Florida ; and by his note of the 19th February, he does give them vague instructions of the time. We think the assumption of the complainant thus to construe his acceptance, utterly unwarrantable. The rule laid down by this court in *Eliason v. Henshaw*, 4 Wheat. 228, is, that an offer of a bargain by one person to another, imposes no obligation upon the *83] *former, unless it is accepted by the latter, according to the terms in which the offer is made ; and that any qualifications of, or departure from, the terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation on either. The party offering to sell or buy has the right to dictate the terms

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in regard to the time when the proposition shall be accepted, as well as to other material circumstances; nor would the court be astute to inquire after the reasons why a time for acceptance was fixed. The case cited from 4 Wheaton is full to this point. In the case before the court, the reasons lie at the surface. Three other persons were offering to purchase, and it was all-important to know the determination of the complainant at the earliest day. A stronger case for a prompt answer could hardly be presented. Nor do the circumstances set up in excuse by the complainant, such as the situation of his family, the necessity of attending a court, or of going to Florida, alter the case. The complainant, Stephen W. Harris, dictated, as he had the power to do, an answer by return of mail; and if no answer was had by the return of mail, he was free to contract with another.

If it be doubtful whether an agreement has been concluded, or is a mere negotiation, chancery will not decree a specific performance; the principle is a sound one, and especially applicable in a case like this, where the party attempting to enforce the contract has done nothing upon it. *Huddleston v. Briscoe*, 11 Ves. 522.

It is useless to inquire, in this suit, under what circumstances, partial performance, with compensation, could be decreed, as no case is presented for splitting up the contract. Stephen W. Harris offered to sell the whole, and complainant to buy the whole. Nor need we inquire, whether Duval and Shepherd were innocent purchasers; the other defendants having had the right to sell, Duval and Shepherd had the right to buy, of which the complainant had no just grounds to complain. We, therefore, order the decree to be affirmed, with costs.

Decree affirmed.

*WILLIAM REMINGTON, Plaintiff in error, v. OTHO M. LINTHICUM, [*84
Defendant in error.

Sheriff's sale.—Return.—Estoppel.

A sale of land by the sheriff, under the laws of Maryland, seized under a *feri facias*, transfers the legal estate to the vendee by operation of law, and does not require a sheriff's deed to give it validity; but as sheriff's sales of lands are within the statute of frauds, some memorandum in writing of the sale is required to be made. It is immaterial, when the return to the execution is made, provided it be before the recovery in an ejectment for the land sold, as the sale must be proved by written evidence; the sale passes the title, and the vendee takes it from the day of the sale; the evidence may, therefore, be procured before or at trial.

If property is seized under a *feri facias*, before the return-day of the writ, the marshal may proceed to sell at any time afterwards, without any new process from the court; as a special return on the *feri facias* is one of the necessary modes of proving the sale, the marshal must be authorized to make the indorsement, after the regular return-term, in cases where the sale was made afterwards.

The return to a *feri facias*, if written on the writ, should be so full as to contain the name of the purchaser, and the price paid for the property, or it would not be a sufficient memorandum of the sale, within the statute of frauds; nor can an imperfect return of a sale be made complete, by a reference to the private memorandum book kept by the marshal of his sales; as it was not a sufficient memorandum of a sale, within the statute.

When the deeds of the defendant in the ejectment have been referred to by the plaintiff, for the sole purpose of showing that both parties claim under the same person, this does not prevent the plaintiff impeaching the deeds afterwards for fraud.

Linthicum v. Remington, 5 Cr. C. C. 546, affirmed.

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ERROR to the Circuit Court of the the District of Columbia, and county of Washington. The defendant in error, Otho M. Linthicum, instituted an action of ejectment, in the circuit court of the county of Washington, for the recovery of certain real estate, situated in the county of Washington, which had been purchased by him at a marshal's sale, sold under three writs of *fi. facias*, against Z. M. Offutt; and which the defendant in the execution claimed to hold under a deed of conveyance made by Z. M. Offutt, after the judgments on which the property was sold.

On the trial of the cause, on the fourth Monday in March 1839, the counsel for the defendant in the circuit court, took three bills of exception to the decisions of the court, upon points submitted to them; and a verdict and judgment having been rendered for the plaintiff in the ejectment, the defendant prosecuted this writ of error.

The cause was argued by *Brent, Jr.*, for the plaintiff in error; and by *Marbury* and *Coxe*, for the defendant.

The first bill of exceptions stated, that on the trial of the cause, the plaintiff offered in evidence the record and proceedings in the three cases of *O. M. Linthicum v. Z. M. Offutt*, and then further offered in evidence three writs of *fi. facias*, issued against the lands of said Offutt; which, it was *85] admitted by the plaintiff, had not *been returned to the clerk's office by the marshal; but were produced on the trial, by the marshal, at the instance of the plaintiff, with the written return thereon, as follows:

"Levied as *per* schedule; property sold as *per* return annexed; and satisfied pl^{ff} as *per* receipt on writ. ALEXANDER HUNTER, Marshal."

"Received of Alexander Hunter, marshal, six hundred and seventy dollars and sixty-six cents, in full of this *fi. fa.* Debt, interest and costs, \$670.66. O. M. LINTHICUM."

"January 22d, 1838."

The returns on the other writs were the same in effect and form. And further offered in evidence the schedule of the property sold, describing the property as follows: "Part of lot No. 153, on Third street, in Beatty & Hawkins' addition to Georgetown, beginning two hundred and twenty-six feet from Market street, thence running east with Third street, thirty feet, thence south, one hundred and fifty feet, thence west, thirty feet, and thence to the beginning, one hundred and fifty feet, with the improvements thereon, being a two story brick house, &c."

And he also offered in evidence the private book of entries kept by the marshal, of his official sales, &c., in which is the following entry, made on the 13th of January 1838, by his clerk employed in his office; but who was not a deputy-marshal:

Account of Sales.

The property of Zachariah M. Offutt sold, to satisfy judicials to November term 1837, No. 65, 66 and 67, in favor of Otho M. Linthicum; also judicials No. 355, to November term 1837, in favor of Samuel Cunningham, use of William Remington; and struck off as follows:

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January 13th, 1836. Part of lot No. 153, in Beatty & Hawkins' addition to Georgetown, thirty feet front, with the improvements, sold to Otho M. Linthicum for . . . \$700 00
 Part of lot No. 153, twenty feet front, sold to Otho M. Linthicum for . . . 200 00

\$900 00

Deduct expenses as follows :

Printer's bill, (Advocate) . . . \$ 7 00
 Marshal's fee . . . 17 17

24 41

\$875 59

Sale of personal property, sold 23d December 1837.

Net amount, after deducting \$84 for house-rent, . . . 300 79

\$1176 38

Amount of execution, and credited judicials

No. 65, to November term 1837 . . . \$670 66

Judicials No. 66, do., do., credited with this sum . . . 505 72

\$1176 38

ALEXANDER HUNTER,
 Marshal, D. C.

*And further offered to prove that the said entry was truly copied from the original memorandum made by the deputy-marshal at the time of sale, which original paper was lost ; and that the said entry was made in the said book, by the said clerk, according to the usage and practice of the marshal's office. [*86

And the plaintiff further offered to give in evidence a written list of said writs of execution, by the said marshal.

OTHO M. LINTHICUM }
 v. No. 66, Judicials,
 ZACHARIAH M. OFFUTT. } November Term 1837.

By virtue of the said writ of *fiery facias*, to me directed, I hereby return to the said court that, in pursuance of said writ, returnable to November term 1837, and under the levy by me made, as *per* schedule returned with the said writ, I did, after due advertisement thereof, sell the real property mentioned in said schedule and appraisement. That said sale was made, according to law, on the 13th January 1838 ; and at said sale, Otho M. Linthicum, being the highest bidder, became the purchaser of the first of said described pieces of property, viz., the part of lot No. 153, in Beatty & Hawkins' addition to Georgetown, described in said levy and schedule, for the sum of seven hundred dollars, and the other piece of property mentioned in said schedule and levy, viz., that part of lot No. 153, in Beatty & Hawkins' addition to Georgetown, therein described, for the sum of two hundred dollars ; and having, in all respects, fulfilled and complied with the conditions of sale, and paid the purchase-money to me, he

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became the purchaser thereof. All which I certify, and return, this 19th day of April, in the year 1839.

A. HUNTER, Marshal.

Which return, it was admitted by the plaintiff, was not written or made out, until after the jury were empanelled in this cause; and the plaintiff accompanied his said last-mentioned offer with a prayer to the court to authorize said marshal to make said written return of said writs: to the admissibility of all which testimony so offered, and to the granting of which prayer, the defendant objected; but the court overruled said objection, and authorized the marshal to make said written return, and admitted the said written return, as well as the other testimony above offered by the plaintiff, to go in evidence to the jury.

*87] The defendant's second bill of exceptions was as follows: The counsel for the plaintiff, in opening his case to the jury, claimed title to the premises in question under a sale by the marshal of said premises, under a writ of *fiery facias*, at the suit of O. M. Linthicum v. Z. M. Offutt, and that said defendant claimed title to same premises under a conveyance from said Offutt to W. Remington, which said last-mentioned deed would be proved to be fraudulent and void, as against said plaintiff. And the counsel for the defendant having, in his opening of his cause to the jury, stated, that the defendant did claim title under said deed from Offutt to Remington, and the said plaintiff having offered the evidence mentioned in the preceding bills of exceptions, now, for the purpose of showing that said defendant claimed title under Offutt, and preparatory to impeaching the same for fraud, gave in evidence the deed from Z. M. Offutt to James Remington, dated 18th April 1835, recorded 17th October 1835; and the deed from James Remington to William Remington, dated 16th October 1835, recorded 16th April 1836; and then offered further to prove that said last-mentioned deeds were fraudulent and void as against said plaintiff: to the admissibility of which said evidence, the defendant objected.

The defendant's third bill of exceptions was the following: The plaintiff, in addition to the evidence contained in the foregoing bills of exception, offered evidence tending to prove that the conveyance from Z. M. Offutt to James Remington was fraudulent as against the plaintiff's lessor: and the defendant then offered evidence tending to prove that the said mentioned conveyance was fair and *bonâ fide*, and for a valuable consideration, and not intended to hinder, delay or defraud the said plaintiff's lessor; and then moved the court to instruct the jury that, upon the evidence offered by the plaintiff, if believed by them, he is not entitled to recover: which instruction the court refused to give:

Brent, Jr., for the plaintiff in error, contended, that to entitle the plaintiff below to recover, he must show a title to the lot of ground in Offutt, and that this title is in him legally, not equitably. 2 Phil. Evid. 204. The legal title must be in the plaintiff, when the ejectment is brought, and this on the day the demise is laid. 2 Maule & Selw. 446; 5 Har. & Johns. 173; 3 Ibid. 19; 8 Pet. 318. The plaintiff below traced no title in Offutt, but gave in evidence the deed from Offutt to James Remington, and the deed from James Remington to William Remington; thus using these conveyances for the purpose of exempting himself from proof of title in Offutt,

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by showing that both parties to the ejectment claimed from the same person. The plaintiff below, in opposition to, and inconsistent with, these deeds, thus used by himself, denies their validity to give a title to the defendant; thus assailing his own evidence. This is in direct opposition to the rule of law, that a party cannot impeach his own evidence. If the deed was void for fraud, then the party alleging the fraud cannot set up *the deed for any purpose; if he claims a benefit from it, he cannot [*88 impeach it.

The question presented on the first bill of exceptions is, whether the court erred in allowing the marshal to make out his return to the execution, after the jury were sworn to try the cause? It is submitted to the court, that the plaintiff in ejectment should have a title at the time of the demise laid in the declaration. A purchaser at a sheriff's sale, must show a title in the defendant, under whom he claims. 2 Phil. Evid. 204; *Binney v. Chesapeake and Ohio Canal*, 8 Pet. 218; 3 Har. & Johns. 19; 5 Ibid. 173. If this is the law, the plaintiff below must fail. He did not show title in Offutt; he only showed a judgment and executions against him. The returns to the executions were made out, after the trial of the cause had commenced. Did the court err in allowing the marshal to make the return, when it was made in this case? It was not an amendment, but was an original return; none had been made before, there was nothing to amend by. And if it was an amendment, it was not made in time. 2 Har. & Gill 637. The courts of Maryland have sustained motions to quash writs of execution, for want of sufficient returns. There is no case in which an amendment has been allowed, to the extent of the return made by the marshal in this case.

The great question in the case is, could the plaintiff below, on the whole evidence, recover? He did not show a legal title at the time when the suit was brought. The return, even if made in proper time, is not a legal title; no deed for the property was executed by the marshal. A purchaser at a sheriff's sale must show a deed from the sheriff, or a memorandum, admitted to be equivalent to a deed, to take the case out of the statute of frauds. 1 Har. & Johns. 451; 6 Ibid. 204; 5 Ibid. 203. It is admitted, that if a deed had been executed, there would be no necessity for a return by the marshal; the deed would be sufficient. 1 Har. & Gill 438-48; 5 Gill & Johns. 206. Have the courts of Maryland decided, that a mere private note or memorandum in writing, by a sheriff, will be sufficient to maintain an action? This would be contrary to the statute of frauds. Cited, Sugd. on Vend. 63; 2 Caines Cas. 61. The case in 4 Wheat. 63 is not at variance with these principles.

The uncertainty in the description of the property, in the declaration in the ejectment, cannot be allowed. Great strictness is insisted upon in the description of the property sought to be recovered. Possession of the property is to be given according to this description. The defect of the description in this case, is manifest. No one could, with it, find the property.

Marbury and Coxe, for the defendant.—In the circuit court, the plaintiff produced all the law requires, *to sustain his title under the sale by the marshal. 1. An existing judgment. 2. A *fiery facias*. [*89 3. A levy on the property. 4. A sale by virtue of the execution and levy.

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To prove the sale, he offered the book kept by the marshal in which he made entries of his official sales, and the return of the writs of execution. To the admissibility of all this evidence, the defendant in the circuit court objected.

The objection to the first bill of exceptions is, as to its generality. There is a denunciation of the whole of the evidence of the plaintiff, and yet it cannot be doubted, that a large portion of it was free from exception. It was the duty of the party who took the exception, to point out, particularly, that which was its object. *Moore v. Bank of the Metropolis*, 13 Pet. 310.

As to the objection to the introduction of the return of the marshal, after the trial had commenced, it is submitted, that the return was of no importance. The title of the plaintiff below, as purchaser at the marshal's sale, was complete, when the sale took place. This point was determined in the case of *Wheaton v. Sexton*, 4 Wheat. 503 ; the court having decided, that "it was immaterial, whether the writs were returned or not ; the purchaser took his title from the sale."

The particular evidence objected to, was the entry in the marshal's book of sales ; and the marshal's return to the execution. But it has been shown from the authority cited, and others can be adduced, that to give a title, a return is not required. The property of the defendant is transferred to the purchaser by operation of law, and no further act of the officer is required. *Boring v. Lemmon*, 5 Har. & Johns. 223 ; *Barney v. Patterson*, 6 Ibid. 204 ; Barnes on Sheriffs 262. The entry in the book of the marshal was not offered as the evidence of title, but to prove the sale ; and for this purpose there was no objection to it. So also was the return on the execution. They supplied the requisitions of the statute of frauds. In the case of *Fenwick v. Floyd*, 1 Har. & Gill 174, it was held, that a sheriff's sale might be proved—1. By the deed of the sheriff ; 2. By the return of the sheriff on the *feri facias* ; 3. By a memorandum of the sale, to take the case out of the statute of frauds. Cited also, 6 Gill & Johns. 306. The marshal made no deed in this case, and the return is sufficient.

The only objection which has any apparent force, is to the time when the return was made. But no rule of law is known, which prescribes the time within which the return shall be made ; provided it is made before the writ leaves the hands of the officer, and the return is made to the clerk of the court. If the return was necessary to complete the title of the purchaser, it ought to be made before suit is brought by the purchaser of the property, since the plaintiff in such a suit must have the title, before he commences his action. But this is not the law. In this case, the marshal *90] had retained possession of the writs, he had not indorsed *on them his return, before they were offered in evidence ; he was required to make the return, and he did so ; and this is in conformity with the decisions in the courts of Maryland. 2 Gill & Johns. 359. In this case, the court held, "that it was not necessary that the return should be indorsed on the writ, or the deed of the sheriff executed, at the time of the sale."

If the return is insufficient, the entry in the marshal's sales-book supplies the deficiency. It was proved, that the entry was according to the usage and practice of the officer ; that it was made in a book kept for the purpose, and by the clerk of the marshal ; and that it was truly made from an original memorandum, made by the deputy-marshal, at the time of the sale,

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which memorandum was lost. This is as good evidence as, in the absence of the lost memorandum, can be required. The entries contain all that is essential—all that can be required: the name of the purchaser; the price for which the lot sold; with such a description of the property, connected with the schedule, as gave it entire certainty.

As to the second bill of exceptions, taken by the defendant in the circuit court, it was said, the deed from Offutt, the defendant in the execution, was offered, with a notice of intention to impeach their validity as against the title of the plaintiff under the sale; and exclusively to show, that both the parties in the ejectment claimed title from Offutt. The title in Offutt could have been proved by another course, but this was the most ready mode of establishing it as between the parties in the circuit court. It was competent to introduce the deed; and then to show that the judgments under which the plaintiff below claimed were earlier than the date of the deed.

The third exception by the plaintiff in error, was to the introduction and effect of conflicting testimony. It is sufficient to remark, that this testimony was properly left to the jury.

TANEY, Ch. J., delivered the opinion of the court.—This was an action of ejectment brought by Linthicum against Remington, in the circuit court for Washington county, in the district of Columbia, to recover part of lot No. 153, in Beatty and Hawkins' addition to Georgetown.

It seems, that a certain Zachariah M. Offutt, of the said county, was the owner of the property in question; and being indebted to Linthicum in three several sums of money, actions were brought by the latter upon those claims, in the year 1836. Judgments were obtained, in due course of law; and executions against the property of the defendant were issued upon each of them, returnable to November term 1837, of the said court. Upon each of these writs of *fieri facias*, the marshal seized the property which is now in question, and sold it at public sale, on the 13th of January 1838; and at this sale, Linthicum was the highest bidder, and became the purchaser. In 1835, before the institution of any of the above-mentioned *suits, Offutt, [*9] by deed duly executed, conveyed this property to James Remington, who, in the same year, conveyed it, in like manner, to William Remington, the plaintiff in error. Linthicum, having purchased of the marshal, as before mentioned, brought an ejectment, in February 1838, against William Remington, who was the tenant in possession. The case came on for trial at March term 1839, and the judgment of the circuit court being in favor of the plaintiff, the defendant brought the writ of error which is now before us.

Three bills of exception were taken at the trial, but the principal and most important question arises on the first. It appeared, that the writs of *fieri facias*, hereinbefore mentioned, had not been returned to the court, but had remained in the possession of the marshal, and were produced by him at the trial, after the jury were sworn. The plaintiff offered these writs in evidence, together with the indorsements upon them, and also a schedule, in the usual form, of the property seized; and a particular account of its sale, as entered in a book kept by the clerk of the marshal for such purposes. It is however unnecessary to state the contents of those indorsements, and of the said account, because the opinion of this court does not turn upon them.

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In addition to these papers, the plaintiff offered in evidence a special return of the said writs by the marshal, which return, it was admitted, was not written until after the jury were impanelled ; and the plaintiff accompanied this offer with a prayer to the court to authorize the marshal to make such written return. The return thus offered bears date April 19th, 1839, which is the term at which the ejectment was tried in the circuit court. It states, that the *fiery facias* was levied on this property ; that it was duly advertised, and sold according to law ; states the day of the sale ; that Linthicum being the highest bidder, became the purchaser ; states the price at which he bought ; that he had paid the purchase-money, and fulfilled the conditions of the sale. This return refers to the schedule of the property seized, and returned with the writ ; in which the lot in question is described by abutments, with sufficient precision. To the admission of all or any of this evidence the defendant objected ; but the objection was overruled by the court, and the evidence admitted ; and this forms the first exception.

The evidence stated in this exception was offered by Linthicum, in order to show a legal title in himself, at the commencement of the suit ; and, undoubtedly, such a title must be shown by the plaintiff in ejectment, and he cannot recover upon a title acquired pending the action. In deciding upon the admissibility of this evidence, for the purpose for which it was offered, we must, of course, be governed by the laws of Maryland, so far as we can gather them from the decisions of her courts ; because the property in question is situated in Washington county, in this district, where the laws of Maryland, as they existed at the time jurisdiction was assumed by congress, have been adopted.

*In the case of *Boring's Lessee v. Lemmon*, 5 Har. & Johns. 225, *92] the court of appeals of Maryland held, that the sale of land by the sheriff, seized under a *fiery facias*, transferred the legal estate to the vendee by operation of law ; and that a deed from the sheriff was not necessary. The authority of this case is recognised in *Barney's Lessee v. Patterson*, 6 Har. & Johns. 204 ; in which the court say, "it is not the return of the officer that gives title to purchaser, but the previous sale." But they then proceed to qualify, in some measure, the general expressions used in *Boring's Lessee v. Lemmon*, and declare, that sheriffs' sales of land are within the statute of frauds, and that some memorandum in writing is necessary to be made ; and they recommend, for the safety of purchasers, that in addition to a deed from the officer, there should be a special return of the execution, particularly describing the premises, and setting out the name of the purchaser ; either of which (the deed or the special return), the court say, "though not operating to pass the title, would be safe and competent evidence of the sale.

The chief objection to the special return made by the marshal in this case is, that it was not made before the suit was brought ; and is not, therefore, admissible to show title at the commencement of the suit. This objection rests upon the hypothesis that a deed from the marshal, or a special return upon the execution, was necessary to perfect the title of the vendee. But the court of appeals of Maryland, in the two cases above referred to, have decided, that neither the return nor the deed pass the title ; that they are nothing more than evidence of the sale ; and that it is the sale which transfers the title, by operation of law. It would seem to follow from

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these decisions, that it cannot be material, at what time this evidence is obtained. He cannot recover without it, because the sale being within the statute of frauds, it must be proved by written evidence. But whenever this evidence is obtained, it proves the previous sale by the officer; and as it is the sale that passes the title, the vendee must take it from the day of the sale. The evidence may be procured, therefore, before or after suit brought; or before or after the jury are sworn in the trial of the ejectment. And the special return of the marshal, in the case before us, made at the time of the trial, was admissible in evidence; for when thus made, it related back to the sale, and proved the title to be good from that day. The return is also sufficiently special, and complies with the statute of frauds.

Neither is there any objection to the time at which this execution was actually returned to the court. It is true, that it was made returnable, on the face of it, to November term 1837. But if property, real or personal, is seized under a *fiery facias*, before the return-day of the writ, the marshal may proceed to sell, at any time afterwards, without new process from the court. And as a special return on the *fiery facias* is one of the modes of proving the sale, and securing the title of the purchaser; the marshal must be authorized to make the indorsement, after the regular return-term, in cases when the sale was made afterwards. In this case, the executions had never been returned; they were still in the possession of the marshal; and the return at first indorsed on them, was still in his power; and if he believed it not correct, or not sufficiently particular, he had a right to change it. His return, when thus made, was under his oath of office; and he was equally responsible for it, as if it had been made on the return-day named in the writ itself. And as the executions in question had not before been returned to the court, we do not think that any leave was necessary, in order to authorize the special indorsement made upon them. [*93

We have said nothing of the short returns indorsed, in the first instance, on these executions; nor of the accounts of sales contained in the marshal's private book of accounts; because the returns, as first written, did not name the purchaser, nor state the price paid for the property; and were, consequently, not, of themselves, such written evidence as would satisfy the statute of frauds. Nor can they be made better, by reference to the memorandum of the sales in the private book accounts of the marshal, which certainly was not that kind of written evidence of the contract, of which Linthicum could avail himself, in order to avoid the operation of the statute of frauds. We place the decision upon the special return before mentioned.

The second exception may be disposed of in a few words. In order to supersede the necessity of tracing a title regularly from the state, the plaintiff read in evidence the deed from Offutt to James Remington, and from James Remington to William Remington, hereinbefore mentioned; for the purpose of showing that the defendant in ejectment, William Remington, claimed title under the said Offutt. And then offered further to prove that the said deeds were fraudulent and void, as against him, the plaintiff. This last-mentioned evidence was objected to by the defendant, but admitted by the court; and we think rightly admitted. The deeds were read by the plaintiff, to show, that

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Remington claimed under Offutt, but not to show that he was a *bond fide* purchaser. And when he afterwards offered evidence to prove that these deeds were fraudulent, there was nothing in this offer inconsistent or incompatible with what he had before endeavored to establish by the production of these deeds.

The third and last exception has not been much pressed here, and certainly, in the manner in which the point is here stated, there is nothing for this court to act upon. The exception states, generally, that the plaintiff offered evidence tending to prove that the conveyance from Offutt to James Remington was fraudulent as against the plaintiff; and that the defendant offered evidence tending to prove the contrary; and then moved the court to instruct the jury, that upon the evidence offered by the plaintiff, if believed by them, he was not entitled to recover; which instruction the court refused. No part of the evidence given by the plaintiff to establish the fraud, nor any given by the defendant to rebut it, is stated in the exception. It is impossible to say, that *the circuit court were in error, *94] when we have none of the facts before us upon which their opinion was given. Indeed, from the manner in which the testimony is referred to in the exception, it would seem, that the question was rather one of fact than of law; and that it was, therefore, properly left to the jury.

An objection has also been taken to the declaration, upon the ground that the property sued for is not described in it with sufficient precision. It is described, as "all that lot, piece or parcel of land, lying and being in Georgetown aforesaid, being that part of lot No. 153, in Beatty and Hawkins' addition to Georgetown aforesaid, which is bounded as follows, to wit:" and the declaration then proceeds to set out its abuttals. Undoubtedly, it has often been decided in Maryland, that a declaration for a part of a tract of land, by its name only, or for part of a lot in a town, by its number only, without setting out the lines or boundaries, is too uncertain; and that an action cannot be supported upon such a declaration. But this case does not come within these decisions, because the vague and imperfect description objected to, is immediately followed in the declaration by a particular description by lines and boundaries. It is said, however, that this description is also too vague and uncertain, and that the property is not sufficiently identified by abuttals, set out in the declaration. We think otherwise. The description of the premises appears to us to be sufficient, and we perceive no objection on that score, which ought to have prevented the plaintiff in the court below from sustaining his action. The judgment of the circuit court is, therefore, affirmed.

Judgment affirmed.

*PETER E. FREVALL, Appellant, *v.* FRANKLIN BACHE, Administrator of JOHN DABADIE, deceased, Appellee.

French indemnity.

A claim for the sum awarded by the commissioners under the treaty of indemnity with France of July 4th, 1831.

The powers and duties of the commissioners under the treaty of indemnity with France, were the same as those which were exercised under the treaty with Spain, by which Florida was ceded to the United States; as decided in the cases of *Comegys v. Vasse*, 1 Pet. 212, and *Sheppard v. Taylor*, 5 Ibid. 710. There is a difference in the words used in the treaty and act of congress, when defining the powers of the board of commissioners; but they mean the same thing. The rules by which the board acting under the French treaty is directed to govern itself, in deciding the cases that come before it, and the manner in which it is constituted and organized, show the purposes for which it was created. It was established for the purpose of deciding what claims were entitled to share in the indemnity provided by the treaty; and they, of course, awarded the amount to such person as appeared from the papers before them to be the rightful claimant; but there is nothing in the frame of the law establishing the board, nor in the manner of constituting and organizing it, which would lead to the inference that larger powers were intended to be given than those conferred on the commissioners under the Florida treaty.

APPEAL from the Circuit Court of the District of Columbia, and county of Washington.

The case was argued by *Coxe*, for the appellant; and by *Key*, for the appellee.

TANEY, Ch. J., delivered the opinion of the court.—This case comes before this court upon an appeal from the circuit court for the district of Columbia. The controversy has arisen out of the shipment of a cargo of cotton, indigo and coffee, made in the fall of 1809, in the brig *Spencer*, from Philadelphia to St. Sebastians, or Port Passage. The vessel duly arrived and discharged her cargo. She was afterwards seized, and the cargo sequestered, by the French government. In the following year, the vessel was liberated, and returned to the United States; but the cargo was never restored.

The cargo of the *Spencer*, thus sequestered, was entitled to share in the indemnity provided by the treaty with France, of July 4th, 1831. But a dispute arose before the commissioners appointed under that treaty, as to the right to five-sixteenths of the indemnity allowed for this cargo. The opposing claimants were the present appellant, who claimed for the whole of the cargo, and the appellee, who claimed for the said five-sixteenths. The commissioners awarded in favor of the latter. The appellant, therefore, filed his bill against the appellee, in the circuit court for Washington county, in the district of Columbia; alleging, among other things, that a certain Andrew Curcier, then a resident merchant in Philadelphia, was the owner of the *Spencer* *and her cargo, on the voyage in question; that the said seizure and sequestration gave him a valid claim against the French government; which he, afterwards, for a valuable consideration, transferred it to the claimant, who took it without notice of any other claim. And he charges also, that if Dabadie, the appellee's intestate, ever had an interest in the cargo, it had been relinquished to Curcier, by a settlement which took place between them in 1818, long before the assignment to the complainant. And he produces, as an exhibit, the account which, as he

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alleges, contains this renunciation : and he prays that the appellee may be enjoined from receiving the five-sixteenths awarded to him by the commissioners ; and that the secretary of the treasury and the treasurer of the United States may be enjoined from paying it.

To this bill, the appellee put in his plea and answer, pleading the award of the commissioners in bar of the complainant's bill ; and also insisting, by way of answer, Debadie owned the five-sixteenths of the cargo in question, and had a valid claim, on that account, against the French government ; that he had never transferred nor relinquished it to Curcier ; and that his (Dabadie's) administrator was entitled to receive it out of the indemnity provided by treaty ; and he exhibits as the evidence of his interest in this cargo, an account, signed by Andrew Curcier, in behalf of himself and Stephen Curcier, and dated June 16th, 1810.

A general replication was put in by the complainant ; and the testimony of a witness residing at Marseilles, in France, was taken by agreement of parties. This witness, it appears, is a native of France, but resided in Philadelphia ; and was engaged in commerce there, from the year 1796 until 1827, when he returned to his own country, where he has ever since resided. He was intimate with Curcier and Dabadie ; and he states in his testimony, that in the year 1818, at Philadelphia, he, as umpire and mutual friend, settled an account between them, in which all differences were finally adjusted ; that the voyage of the Spencer to St. Sebastians, and the ownership of her cargo, were settled in that account ; and that by the terms of the settlement, the claim on the French government for indemnity was afterwards to belong to Curcier. The witness mentions circumstances which took place at the settlement, to show that his memory is firm and accurate in relation to it. He states, that it was reduced to writing, in the shape of an account-current, as was customary ; and that two accounts were made, exactly the same in every particular, both original, and one of them delivered to each of the parties. No account-current, however, was exhibited to the witness at the time of his examination, and none, therefore, has been identified by him as the account-current settled between the parties in 1818 ; and he states that he had not recently seen it, nor had any communication from any one in relation to its contents.

Upon the hearing, the circuit court dissolved the injunction, and dismissed the bill ; and the case is brought before this court by the appeal of the complainant.

*97] *Two questions have been presented for consideration here :—
1. Is the decision of the commissioners appointed under the treaty with France, conclusive upon the rights of the parties ? 2. If the case is not concluded by the decision of the commissioners, is the appellant, upon the testimony in the record, entitled to relief ?

Upon the first question, the court have entertained no doubt. This case cannot, we think, be distinguished from the cases of *Comegys v. Vasse*, 1 Pet. 212, and *Sheppard v. Taylor*, 5 Ibid. 710. It has been argued on the part of the appellee, that these cases were decided under the treaty with Spain, and that the language of that treaty, and of the act of congress creating the board of commissioners under it, differs materially from the treaty and act of congress under consideration, when defining the powers of the board. It is true, that there is a difference in the words used ; but in our

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judgment, they mean the same thing. The rules by which the board is directed to govern itself in deciding the cases that come before it, and the manner in which it was constituted and organized, show the purposes for which it was created. It was established, for the purpose of deciding what claims were entitled to share in the indemnity promised by the treaty ; and they, of course, awarded the amount to such person as appeared from the papers before them, to be the rightful claimant. But there is nothing in the frame of the law establishing this board, nor in the manner of constituting and organizing it, that would lead us to infer, that larger powers were intended to be given than those conferred upon the commissioners under the Spanish treaty. The plea, therefore, put in by the defendant, in bar of the complainant's bill, cannot be sustained ; and the case is fully open before this court upon its merits.

Upon the second point, there has been much more difficulty. It is very clear, that Dabadie was the owner of five-sixteenths of the cargo of the Spencer, upon the voyage, in the fall of 1809, from Philadelphia to St. Sebastians or Port Passage. This is abundantly proved by the account stated and signed by Andrew Curcier, for himself and Stephen Curcier, in June 1810. For Dabadie, in this account, is charged with \$13,700.13, for his five-sixteenths of the cargo, and with \$3993.95, for insurance upon it. He was, therefore, entitled to indemnity, to the extent of his interest in the cargo, and had a valid and just claim for it against the French government. Has this interest been transferred to Curcier ? The witness above mentioned deposed, that it was relinquished to him, and the agreement reduced to writing in an account-current, settled in June 1818. If such an account had been produced by the plaintiff, it would decide the controversy in his favor. He does, indeed, produce an account settled between the parties, with mutual acquittances, in June 1818. But it is not such an account as the witness describes. Neither of the sums with which Dabadie was debited in the account of 1810, for his share of the cargo, and for insurance, *appear in any way in this account of 1818. The acquittances, [98 therefore, then executed, do not apply to them : they apply only to claims which the parties may have had against one another ; and not to claims which either of them had against the French government, or any other third party.

There is an item in the account of 1818, which has been much relied on by the complainant ; in which Dabadie is credited with five-sixteenths of the proceeds of the Spencer's cargo on this voyage, sold at six months' credit. But there is nothing to show that any part of the outward cargo was sold in France. On the contrary, the bill states that the whole cargo was sequestrated, and claims indemnity for the whole ; and the answer admits the seizure of the whole, and claims indemnity for five-sixteenths of the entire cargo. We cannot, therefore, suppose, that this item refers to the proceeds of her outward cargo ; for such an inference would be contrary to the allegations of both the bill and the answer. And if it refers to a homeward cargo, there is no evidence to show that such a cargo was brought by the Spencer ; nor, if brought, by what means or out of what funds it was procured. There is certainly nothing in the record, to connect this item in any manner with the outward cargo which was seized ; nor to alter the rights of property in it. It does not answer the description

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which the witness gives of the account which he settled in 1818, as the umpire and mutual friend of the parties; and it is highly probable, that the transaction of which he speaks, may, from the lapse of time, have been confounded with some subsequent voyage of the same vessel, out of which disputes may have arisen between the parties. He states, that he has not seen the account, nor communicated with any person about it; and after twenty years have passed, it ought not to be a matter of surprise or reproach, if some of the items of an account, and some of the circumstances connected with the settlement of it, were not accurately remembered. At all events, there is nothing in the account of 1818, or any account in the case, that would justify us in saying that the claim of Dabadie to the indemnity in question was transferred to Curcier, as charged in the bill. The decree of the circuit court is, therefore, affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*99] *JOHN PETERS and JOHN PETERS, JR., Plaintiffs, v. The WARREN INSURANCE COMPANY, Defendants.¹

Marine insurance.—Proximate cause of loss.—General average.

Insurance was made to the amount of \$8000 on the ship Paragon, for one year; the policy containing the usual risks, and among others, that of the perils of the sea; the assured claimed for a loss by collision with another vessel, without any fault of the master or crew of the Paragon; and also insisted on a general average and contribution. The Paragon was in part insured; and in November 1836, in the year during which the policy was in operation, she sailed from Hamburg, in ballast, for Gottenburg, for a cargo of iron, for the United States; while proceeding down the Elbe, with a pilot on board, she came in contact with a galliot, and sunk her; she lost her bowsprit, jib-boom and anchor, and was otherwise damaged, and put into Cuxhaven, a port at the mouth of the Elbe, and in the jurisdiction of Hamburg. The master of the galliot libelled the Paragon, alleging that the loss of his vessel was caused by the carelessness or fault of those on board the Paragon; upon the hearing of the cause, the court decided, that the collision was not the result of the fault or carelessness of either side; and that, therefore, according to the marine law of Hamburg, the loss was a general average loss, and to be borne equally by both parties; that is, that the Paragon was to bear one-half of the expense of her own repairs, and to pay one-half of the value of the galliot; and that the galliot was to bear the loss of the half of her own value, and to pay one-half of the repairs of the Paragon; the result of this decree was, that the Paragon was to pay \$2600, being one-half of the value of the galliot (\$3000), after deducting one-half of her own repairs, being \$400. The owners of the Paragon, having no funds in Hamburg, the master was obliged to raise the money on bottomry; there being no cargo on board the Paragon, and no freight earned, the Paragon was obliged to bear the whole loss: *Held*, that the assured were entitled to recover.

A loss by collision, without any fault on either side, is a loss by the perils of the sea, within the protection of the policy of insurance; so far as the injury and repairs done to the Paragon itself extended, the underwriters were liable for all damages.²

The rule, that underwriters are liable only for losses arising from the proximate cause of the

¹ See s. c. 3 Sumn. 389; 1 Story 463.

collision. General Mutual Ins. Co. v. Sherwood, 14 How. 351.

² Otherwise, if the master and crew of the vessel insured were in fault in regard to the

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loss, and not for losses arising from a remote cause, not immediately connected with the peril is correct, when it is understood and applied in its true sense; and as such, it has been repeatedly recognised in this court.

The law of insurance, as a practical science, does not indulge in niceties; it seeks to administer justice according to the fair interpretation of the intention of the parties; and deems that to be a loss within the policy, which is a natural and necessary consequence of the peril insured against.

If there be any commercial contract which, more than any other, requires the application of sound common sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance.

It has been held by learned foreign writers on the law of insurance, that whenever the thing insured becomes, by law, directly chargeable with any expense, contribution or loss, in consequence of a particular peril, the law treats the peril, for all practical purposes, as the proximate cause of such expense, contribution or loss; this they hold, upon the general principles of law, applicable to the contract of insurance. In the opinion of the supreme court, this is the just sense and true interpretation of the contract.

In all foreign voyages, the underwriters, necessarily, have it in contemplation, that the vessel insured must, or at least may be, subjected to the operation of the laws of the foreign ports which are visited. Those very laws may in some cases impose burdens, and in some cases give benefits, different from our laws; and yet there are cases under policies of insurance, where it is admitted the foreign law will govern the rights of the parties, and not the domestic law; such is the known case of general average, settled in a foreign port, according to the local law, although it may differ from our own law.

CERTIFICATE of Division from the Circuit Court of Massachusetts.

*This was a case on a policy of insurance, dated the 1st of April 1836, whereby the defendants insured the plaintiffs, for whom it may [*100 concern, payable to them, \$8000, on the ship *Paragon*, for the term of one year, commencing the risk on the 15th day of March 1836, at noon, at a premium of five per cent. The declaration alleged a loss by collision with another vessel, without any fault of the master or crew of the *Paragon*; and also insisted on a general average and contribution. The parties agreed, that the verdict should be rendered by the jury for the plaintiff or for the defendants, according to the opinion of the court, upon the matters of law arising upon the following statement of the facts of the case.

The plaintiffs were the owners of the ship *Paragon*, insured by the defendants in part. On the 10th of November 1836, the vessel sailed from Hamburg, in ballast, for Gottenburg, to procure a cargo of iron, for the United States. Whilst proceeding down the Elbe, with a pilot on board, she came in contact with a galliot called the *Frau Anna*, and sank her. The *Paragon* lost her bowsprit, jib-boom and anchor, and sustained other damages, which obliged her to go into Cuxhaven, a port at the mouth of the Elbe, and subject to the jurisdiction of Hamburg, for repairs. Whilst lying there, the master of the the galliot libelled the *Paragon* in the marine court, alleging that the loss of the vessel was caused by the carelessness or fault of those on board the *Paragon*. The ship was arrested; but subsequently released, on security being given by the agents of the owners, to respond to such damages as should be awarded by the court. The master of the *Paragon*, in his answer, denied the charges of carelessness or fault on the part of those on board of his ship; and the court, after hearing the parties and their proof, decided, that the collision was not the result of fault or carelessness on either side; and that, therefore, according to article first, title eighth, of the Marine Law of Hamburg, the loss was a general average loss, and to be borne equally by each party: that is, the *Paragon* was to bear

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one-half of the expense of her own repairs, and to pay one-half of the value of the galliot ; and the galliot was to bear the loss of one-half of her own value, and to pay one-half of the expense of the repairs of the Paragon. In conformity with this decision, a general average statement was drawn up by Mr. Oldermann, the despacheur of Hamburg ; an officer appointed by law, and by whom alone such statements can be prepared. In this statement were charged, first, the expenses of repairing the Paragon, after making the deduction of one-third new for old, saving one of her anchors and chains, which was lost at the time of the collision ; wages and provisions of the master and the crew, during the detention, and the expenses of surveys, protest, defending the suit, &c., amounting in all to about \$800, and one-half of which is charged to the Paragon, and one-half to the galliot.

*Secondly, were charged the value of the galliot, as by appraisal *101] under an order of court, of her freight and cargo, the expenses of surveys, protest, prosecuting the suit, &c., amounting in all to about \$6000, one-half of which was to be charged to the Paragon. The statement concludes thus : " Which according to the before-mentioned ordinance relating to insurance and average, is to be borne by ship, cargo and freight, as general average.

The ship Paragon has to claim from the Frau Anna, for half the damages, say \$ 400

And the Frau Anna from the Paragon, one-half the damages, say 3000

So that the Paragon must pay 2600"

Which amount the tribunal of commerce decreed should be paid *instante*. The owners of the Paragon having no funds in Hamburg, the master was obliged to raise the money on bottomry. There being no cargo on board of the Paragon, and no freight earned, the ship had to bear the whole of the general average loss.

The judges of the circuit court were opposed in opinion, on the following point and question, viz : " Whether, in this case, the contributory amount paid by the Paragon on account of the collision, was a direct, positive and proximate effect from the accident, in such sense as to render the defendants liable therefor upon this policy." And on the point and question aforesaid, at the request of the defendants, the same was stated by the said judges, and under their direction as aforesaid, it was ordered to be certified, under the seal of the said circuit court, to the supreme court of the United States, at their next session, to be by the said court finally decided.

The case was submitted to the court, on printed arguments by *Webster*, for the plaintiff ; and *Theophilus Parsons*, for the defendants.

Parsons, for the defendants.—The principal question in this case is, whether the amount paid on account of the collision between the vessels, is a direct, positive and proximate effect from the accident. We do not undertake to say, that there are no contracts in which the *remota causa spectatur*, but certainly, the law of insurance looks only at the proximate cause. Is the collision, then, in this case, a remote or a proximate cause ? If the law of Hamburg is the proximate cause, and the collision the remote cause, then we are clearly discharged ; because we do not insure against the law of Hamburg, nor against any remote cause. But we do insure against

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collision, and the question, therefore, now takes this shape—is the law of Hamburg, with its requirement of contribution, to be taken as a part of the act of collision? *If these questions are to be settled rather by the common sense than by the metaphysics of the law, then it would [*102 seem to be clear, that the collision here is the remote cause; for another cause, to wit, the law of Hamburg, comes between the collision and the contribution; and not only so, but it is this law which actually causes the contribution. The collision, then, is not the proximate cause, for that is proximate which lies nearest; and here another cause is interposed, and thus lies nearer.

How are the authorities? In this country, it is a new question, and there are no cases which bear very strongly upon it. But in England, just this question occurred very recently, and was fully reported in 4 Ad. & Ellis 420, *De Vaux v. Salvador*. This case, interesting both from its novelty and its importance, was fully considered, first, by Lord DENMAN, and then by the court of queen's bench, on a motion for a new trial; and the decision was fully and pointedly for the defence, on precisely the grounds we have taken here. Nothing can be more exact than the analogy between that case and this; nothing more precise and definite; and as we think, nothing can be more reasonable, than the principles upon which this case is decided in England. Will this court decide precisely the same case, on precisely opposite grounds? Some of the continental authorities may seem to be against us. But, not to dwell on the circumstance, that their whole “doctrine of contract” rests upon the civil law, and that the difference, in this respect, between their law and ours, greatly weakens their authority as precedents for us—not to dwell on this—it is very important to remember, that they, as Emerigon and the rest, decide that insurers shall repay the contribution; but they decide under the influence of the law which requires the contribution: that is, on the continent, generally, perhaps, a rule like that of Hamburg, dividing the loss from collision between two innocent vessels, prevails. To the continental writers, it is familiar; they are accustomed to the law, and to all the usages going with the law, which law is perfectly well known there by everybody; and it is very natural, that they should hold insurers liable for the contribution, as if it were a component part of the collision; very natural, and perhaps, very right. Not so with the English courts, or our own: for here, the law so dividing this loss, is unknown; we have none here, and our citizens make their bargains under no such contemplation; and therefore, the courts of England decide rightly there, and our courts should decide like those of England, and unlike the continental writers, because our laws and usages are like those of England, in respect to the liabilities of vessels in cases of collision, and unlike those of the continent. And our laws in respect to the liabilities of the vessels being alike, so should our laws be in respect to the obligations and implied contracts of insurers, in regard to that contract. We insured against damage to the Paragon; but we did not insure against damage to any other vessel.

But there is another view of this subject, which seems to us perfectly *decisive. The continental authorities not only decide, under the influence of their laws, but their policies differ from ours in this [*103 precise particular. They all contain, in the enumeration of the risks, “acci-

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dental running foul." A French policy is in this form, and the court are respectfully referred to it. In this policy, the phrase is "*abordage fortuit*;" and phrases of similar import are in the policies of Amsterdam and Hamburg; which are all the continental policies we have seen. From this it will be obvious, that the only authority where policies like our own were before the court (that is, the high authority of the English courts) is directly and most explicitly adverse to the claim of the plaintiffs. While the continental authorities, when they seem to favor it, are adjudicating upon policies which differ from ours in this precise respect; they refer to policies which, unlike ours, provide expressly for this very case. It would seem, therefore, that the force of these continental authorities is at once annihilated.

The rule, *causa proxima non remota spectatur*, is stronger in England than on the continent; stronger here than in England; the supreme court at Washington having settled it repeatedly and firmly. See *Patapsco Insurance Company v. Coulter*, 3 Pet. 222; *Columbian Insurance Company v. Lawrence*, 10 Ibid. 507; *Waters v. Merchants' Louisville Insurance Company*, 11 Ibid. 213.

But let us look at these foreign authorities more closely. The ordinances which make the insurers liable, are the same which require equal contribution in the case of collision without fault. And this may be right. Thus, in the Modern Code of Commerce, in France, art. 50 touches the insurer; art. 407 regulates the effects of collision. This is right. The liability of the insurer should be conterminous with the liability of an innocent vessel. Where an innocent vessel is held by law liable for half the injury of collision, there the insurer should be held to make it good. But nowhere else. It seems, however, that a very serious question exists in France, as to the liability of insurers to pay for damages, where the collision arises from a fault which cannot be clearly put upon either party: and this doubt has arisen from the fact that the code does not speak precisely upon this point, but expressly makes the insurers liable only where the collision is wholly fortuitous or without any fault. This doubt, or difference of opinion, goes strongly to show, that the opinion of the continental writers is based upon, and most closely connected with, their own ordinances; and thus it takes greatly, if not entirely, away the force of their authority over contracts made in countries where no such law is known; and it leaves in full power the distinct English authority, which is made under laws and usages, and upon policies that are like our own.

If this case is to be likened to other cases of injury from supposed causes, we should suppose any such analogy favorable to *us. Thus, *104] it is perfectly well known, that at Buenos Ayres, and in the East, at Sumatra, and in a Chinese port, it has actually happened, and more than once, and the newspapers of the land were full of the story, that for a collision or some mischief done or supposed to be done, by officers or crew, the ship has been seized, and only restored on payment of a heavy ransom; but nobody ever heard of a call on an insurance company for any such loss. Can the case be supposed to resemble rather a case of salvage? It is true, that the loss by salvage, or by costs of court, is always cast upon underwriters; though there the peril of the sea may be thought, in some sense, the remote cause, and the law the proximate cause. But there is a

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very great difference between these cases, and one that wholly destroys the analogy. The costs of court, and the payment of salvage, belong to the universal law of insurance. Every man who insures, or is insured, anywhere, does so under the law of salvage; and his contract, therefore, acknowledges and respects this law. But it is just otherwise in the present case.

There is another material difference. In the present case, the contribution is in the nature of penalty, or at least, a satisfaction and compensation made by this vessel to the other. Not so with salvage. That proceeds wholly upon the theory, that it is for the benefit of the wrecked or endangered vessel, and therefore, for the insurers upon the vessel: and this principle is repeated in almost every case of salvage, as the reason why more is given to the salvors than mere wages, or compensation for time and labor. And these remarks lead us to the more general view of the case, and to what, we cannot but think, ought to be the governing and determining principle of it, namely, that where an accident occurs which is clearly insured against (a collision for instance), then all those consequences thereof are to be taken as parts of the same thing, and as belonging to the collision, which flow from it by as natural and obvious, or inevitable, consequences, or which are caused by a universal or general law, to which all parties to the insurance are supposed to refer equally in their contract. And all other consequences of the collision, except such as these, are to be considered as not necessary and component parts of the accident, but as connected with it by some local law, or some peculiar circumstance; and are, therefore, not to be considered as insured against by parties, who could not be supposed to have contemplated or anticipated them. This last point seems to us to contain the whole gist of the matter; nor can we perceive how the court can admit the plaintiff's claim, without distinctly contravening their own uniform and well-established decisions.

It may be proper to advert briefly to one other point. It may be suggested, that the defendants are bound by the settlement in Hamburg, as by a foreign adjustment of general average. But the distinction upon that point is perfectly clear and well settled; it is this: No foreign adjustment can determine for us, what is a general average; but it may settle, definitively, as between all the parties, that *general average which is one by our own law, and has certainly happened. In other words, we can always go behind a foreign adjustment of general average, and deny that the facts happened, or that, if they happened, they constituted a general average; but if facts certainly occurred, which by our own law of insurance constitute a general average, then the adjustment in the foreign port is binding upon all the interests. But it is perfectly clear, that this is not the present case, and that by our law of insurance, the facts in the present case would not constitute a general average.

Webster, in reply to the argument for the defendants, submitted to the court, that it appeared to him, that the first positions maintained by the council for the insurance company were questionable, to the extent claimed by him. He says, that however it may be, in regard to some other contracts, the law of insurance looks only at the proximate cause of loss. That this is generally true, may be admitted; but it is not universally true; if the prop-

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osition were universal, it would certainly exclude salvage. Mr. Parsons's answer to this, is, that the payment of salvage is a loss, by the universal law of insurance. This is so : and this proves, not that no case of loss by a remote cause is within the law of insurance, but on the contrary, that one such case, at least, is within that law, by universal consent. The same may be said of costs incurred in the course of judicial proceedings, and of payments on account of general average.

Mr. Parsons admits that collision is insured against, and that all consequences may be regarded as belonging to it which flow naturally from it, or which are caused by a general law, to which all parties may be supposed to have referred. But how can he distinguish, or what reason is given for a distinction, between consequences which immediately arise from natural causes, and those which arise as immediately from the operation of the laws of the place? A ship suffers collision ; the immediate natural effect is injury to her frame. The necessity of an expenditure for repairs is immediately inflicted upon her ; and for this expenditure, the underwriter is liable. Another ship suffers a collision, and does injury to the vessel in which she has come in contact, without fault. The immediate consequence, by the law of the place, is a charge on the ship, creating a lien, for a contribution to the loss ; and this charge causes the necessity of an expenditure. It is not easy to preceive a reason why one of these cases should be within the policy, and the other not within it. The loss, in the latter case, is a consequence of the accident, as necessary, as certain, and as unavoidable as that in the first. The charge becomes attached to the ship ; is an incumbrance, hindering her from the prosecution of her voyage ; keeping her where she is, and removable only by an expenditure. It is an obvious consequence of the accident ; and, in the language of Mr. Parsons, an "inevitable" consequence. The party entitled to the contribution is as sure to claim it, as the carpenter who *106] makes repairs is to *demand payment. The expenditure is a inevitable in one case as in the other.

Mr. Parsons supposes, that the continental authorities are the less to be regarded, as the policies in those countries are different. Thus, he says, that "accidentally running foul" is one of the specifically enumerated causes of loss in a French policy. Be it so. But that fact does not help to settle the question, what loss is to be regarded as the proper consequence of running foul. "Running foul," or collision, it will not be denied, is as completely within this policy, as within a French policy ; and the form or particular words of the policy, in either case, do not affect or touch the question now in controversy. How can it be said, that the French policies provide for this very case? Do they expressly provide for the case of contribution for collision? They certainly do not. They only mention collision, leaving the law to settle what losses arise from it, and how these losses are to be settled. "This very case," in the language of my learned brother, is not a case in which any question is made, whether a loss by collision is within a policy, American, English or French. It is admitted to be within them all. The question, and the only question, in this case, is, whether the loss which has actually happened, is, or is not, a loss by collision. And how, then, is the force of those continental authorities, which declare that losses like this are losses by collision, annihilated? The slightest reason is not seen, to suppose that the decisions of the continental writers have been

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founded, either on the forms of the policies in use on the continent, or on any ordinances. The law of the place imposes contribution in cases of collision. The continental writers are authorities to show, that it follows, not from any ordinance or from any particular words in continental policies, but from the general law of insurance, and the reason of the thing, that the discharge of this contribution is a loss, occasioned by collision.

Many cases might be put to establish the construction for which we contend. The case of capture is one. If a neutral ship, insured against capture, be actually captured, carried in and released on payment of costs and expenses to the captors (a very common case), these costs and expenses are always held to be within the policy. Suppose again, that perishable articles, like provisions, are slightly injured by a storm, less than to the extent of five per cent., but that, before the vessel reaches her port, the effect of time, acting on the goods thus slightly injured, is such as to destroy all their value. Is there any doubt, that, in such a case, the whole loss is to be referred to the storm, and so brought within the policy? And in regard to the converse of the case now before the court, allow the inquiry, what would have been thought of the rights of the parties, if the galliot herself had not been injured, but had injured the *Paragon* to the extent of \$1000: and suppose, the owners of the galliot paid one-half of this sum to the master of the *Paragon*; could the plaintiffs in this suit have recovered more than the balance? Could they pocket what they had received from the galliot, and recover the whole amount of the injury from the defendants? [*107]

With a general remark, these observations are closed. This vessel was insured on time. The commerce of the world was open to her. She was to choose her own track, from nation to nation, or from zone to zone. She was expected, therefore, to fall under the dominion of various codes, and different laws; and to conform, as of necessity she must, to them all, as she should come within the sphere of their respective influences. She must encounter the dangers which belong to the place where she is, or where she goes; and while acting fairly, and in good faith, ought to be protected as within the policy.

STORY, Justice, delivered the opinion of the court.—This is the case of a division of opinion, certified to this court by the judges of the circuit court for the district of Massachusetts. The defendant, by a policy of insurance, dated the 1st of April 1836, insured the plaintiffs, for whom it may concern, payable to them, \$8000, on the ship *Paragon*, for the term of one year, commencing the risk on the 13th of March 1836, at noon, at five per cent. The policy contained the usual risks, and among others, that of perils of the sea. The declaration alleged a loss by collision with another vessel, without any fault of the master or crew of the *Paragon*; and also insisted on a general average and contribution. The parties, at the trial, agreed upon a statement of facts; by which it appeared, that the *Paragon* was owned by the plaintiffs, and was in part insured by the defendants, by the policy above mentioned. On the 10th of November 1836, the *Paragon* sailed from Hamburg, in ballast, for Gottenburg, to procure a cargo of iron for the United States. While proceeding down the Elbe, with a pilot on board, she came in contact with a galliot, called the *Frau Anna*, and sank

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her. By this accident, the Paragon lost her bowsprit, jib-boom and anchor, and sustained other damage, which obliged her to put into Cuxhaven, a port at the mouth of the Elbe, and subject to the jurisdiction of Hamburg, for repairs. Whilst lying there, the master of the galliot libelled the Paragon in the marine court, alleging that the loss of the vessel was caused by the carelessness or fault of those on board of the Paragon. The ship was arrested ; but was subsequently released, on security being given by the agents of the owners, to respond to such damages as should be awarded by the court. Upon the hearing of the cause, the court decided, that the collision was not the result of fault or carelessness on either side, and that, therefore, according to the marine law of Hamburg, the loss was a general average loss, and to be borne equally by each party : that is to say, that the Paragon was to bear one-half of the expense of her own repairs, and to pay one-half of the value of the galliot ; and that the galliot was to bear the loss of one-half of her own value, and to pay one-half of the repairs of *108] the Paragon : the result of which was, that the Paragon was to pay the sum of \$2600, being one-half of the value of the galliot (\$3000), after deducting one-half of her own repairs (\$400). The owners of the Paragon having no funds in Hamburg, the master was obliged to raise the money on bottomry. There being no cargo on board of the Paragon and no freight earned, the Paragon was obliged to bear the whole loss.

Upon this state of facts, the question arose, whether in this case, the contributory amount paid by the Paragon on account of the collision, was a direct, positive and proximate effect from the accident, in such sense as to render the defendants liable therefor. Upon this question, the judges were opposed in opinion ; and it has accordingly been certified to this court for a final decision.

That a loss by collision, without any fault on either side, is a loss by the perils of the sea, within the protection of the policy of insurance, is not doubted. So far as the injury and repairs done to the Paragon itself extend, it is admitted, that the underwriters are liable for all the damages. The only point is, whether the underwriters are liable for the contribution actually paid on account of the loss of the galliot. This point does not appear ever to have been decided in any of the American courts. It is proper, therefore, to examine it upon principle ; and to ascertain what is the true bearing of the foreign authorities upon it.

And first, upon principle : That the owners of the Paragon have been compelled to pay this contribution, without any fault on their side, is admitted ; that it constituted a proper subject of cognisance by the marine court of Hamburg, the collision having occurred within the territorial jurisdiction of that city is also admitted ; and that the claim constituted a charge or lien upon the Paragon, according to the local law, capable of being enforced by a proceeding *in rem*, is equally clear. Why, then, should not the loss be borne by the underwriters, since it was an unavoidable incident or consequence resulting from the collision ? The argument is, that in the law of insurance, which governs the present contract, it is a settled rule, that underwriters are liable only for losses arising from the proximate cause of the loss, and not for losses arising from a remote cause, not immediately connected with the peril. *Causa proxima non remota spectatur*. The rule

is correct, when it is understood and applied in its true sense ; and, as such, it has been repeatedly recognised in this court. But the question, in all cases of this sort, is, what, in a just sense, is the proximate cause of the loss ?

The argument in the present case, on the part of the defendants, is, that the law of Hamburg, is the immediate or proximate cause of the loss now claimed, and the collision is but the remote cause. But, surely, this is an over-refinement, and savors more of metaphysical than of legal reasoning. If the argument were to be followed out, it might be said, with more exactness, that the decree of the court was the proximate cause, and the law of Hamburg the remote cause of this loss. But law, as a practical science, does not indulge in such niceties. It seeks to administer justice according to the fair interpretation of the intention of the parties ; and deems that to be a loss within the policy, which is a natural or necessary consequence of the peril insured against. In a just view of the matter, the collision was the sole proximate cause of the loss ; and the decree of the court did but ascertain and fix the amount chargeable upon the Paragon, and attached thereto at the very moment of the collision. The contribution was a consequence of the collision, and not a cause. It was an incident inseparably connected, in contemplation of law, with the sinking of the galliot ; and a damage, immediate, direct and positive, from the collision. In the common case of an action for damages for a tort done by the defendant, no one is accustomed to call the verdict of the jury, and the judgment of the court thereon, the cause of the loss to the defendant. It is properly attributed to the original tort, which gave the right to damages consequent thereon ; which damages the verdict and judgment ascertained, but did not cause.

But let us see how the doctrine is applied in other analogous cases of insurance, to which, as much as to the present case, the same maxim ought to apply, if there is any just foundation for it here. If there be any commercial contract which, more than any other, requires the application of sound common sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance ; for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions. Take the case of a jettison at sea, to avoid a peril insured against. It is a voluntary sacrifice, and may be caused by the perils of the sea ; but it is ascertained long afterwards, and that ascertainment, whether made by a court of justice, or by an agreement of the parties, would, in the sense of the maxim contended for in the argument, be the immediate cause of the contribution, and the jettison but a remote cause ; and the violence of the winds and waves a still more remote cause of the jettison. Yet all such niceties are disregarded, and the underwriters are held liable for the loss thus sustained by the jettison, as a general average. It is no answer to say, that this is now the admitted doctrine of the law ; and therefore, it is treated as a loss within the policy. The true question to be asked is, why is it so treated ? General average, as such, is not, *eo nomine*, insured against in our policies. It is only payable, when it is a consequence, or result, or incident (call it which we may) of some peril positively insured against ; as, for example, of the perils of the sea. The case of a ransom, after capture, stands upon similar grounds. The ransom is, in a strict metaphysical sense, no natural conse-

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quence of the capture ; it may be agreed upon long afterwards ; and if we were to look to the immediate cause, it might said, that the voluntary act of the party *in the payment was the cause of the loss. But the law *110] treats it as far otherwise ; and deems the ransom a necessary means of deliverance from a peril insured against, and acting directly upon the property. The expenses consequent upon a capture, where restitution is decreed by a court of admiralty, upon the payment of all the costs and expenses of the captors, fall under a similar consideration. In such cases, the decree of the court allowing the costs and expenses may be truly said to be the immediate cause of the loss ; but courts of justice treat it also as the natural consequence of the capture.

A still more striking illustration will be found in the case of salvage decreed by a court of admiralty for services rendered to a vessel in distress. The vessel may have been long before dismasted or otherwise injured, or abandoned by her crew, in consequence of the perils of the winds and waves ; and the salvage decreed in such a case, would seem, at the first view, far removed from the original peril, and disconnected from it ; and yet, in the law of insurance, it is constantly attributed to the original peril, as the direct and proximate cause ; and the underwriters are held responsible therefor, although salvage is not specifically, and in terms, insured against.

These are by no means the only illustrations of the danger of introducing such an application of the maxim into the law of insurance, as is now contended for. Suppose, a perishable cargo is greatly damaged by the perils of the sea, and it should, in consequence thereof, long afterwards, and before arrival at the port of destination, become gradually so putrescent as to be required to be thrown overboard for the safety of the crew : the immediate cause of the loss would be the act of the master and crew ; but there is no doubt, that the underwriters would be liable for a total loss, upon the ground that the operative cause was the perils of the sea. Suppose, a vessel which is insured against fire only, is struck by lightning, and takes fire ; and in order to save her from utter destruction, she is scuttled and sunk in shoal water, and she cannot afterwards be raised ; it might be said, that the immediate cause of the loss was the scuttling ; but in a juridical sense, it would be attributed to the fire ; and the underwriters would be held liable therefor. Suppose another case, that of a vessel insured against all perils but fire ; and she is shipwrecked by a storm on a barbarous coast, and is there burnt by the natives ; it might be said, that the proximate cause of the loss was the fire ; and yet there is no doubt, that the underwriters would be held liable on the policy, upon the ground that the vessel had never been delivered from the original peril of shipwreck.

Illustrations of this sort might be pursued much further, but it seems unnecessary. Those which have been already suggested sufficiently established, that the maxim, *causa proxima non remota spectatur*, is not without limitations ; and has never been applied, in matters of insurance, to the extent contended for ; but that it has been constantly qualified, and constantly applied only in a modified practical sense, to the perils insured *111] against. In truth, in the present *case, the loss occasioned by the contribution is (as has been already suggested) properly a consequence of the collision ; and in no just sense, a substantive independent loss.

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In the next plea, how stand the authorities on this subject? The only authority which has been cited by the counsel for the defendants, to sustain their argument, is the case of *De Vaux v. Salvador*, 4 Ad. & Ellis 420. That case is certainly direct to the very point now in judgment. It was a case of collision, where the assured had been compelled to pay for an injury done to another vessel, by the mutual fault of both vessels, according to the rule of the English court of admiralty; which, in a case of mutual fault, apporions the loss between them. Lord DENMAN, in delivering the opinion of the court, admitted, that the point was entirely new; and after referring to the above maxim, said, "It turns out, that the ship (insured) has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the court of admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea. It grows out of an arbitrary provision in the law of nations; from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against." This is the whole reasoning of the learned judge upon the point; and with great respect, if the views already suggested are well founded, it is not supported by the analogies of the law, nor by the principles generally applied to policies of insurance. The case of a penalty, put by the learned judge, does not strike us with the same force as it does his lordship. If any nation should be so regardless of the principles of natural justice, as to declare that a vessel driven on shore by a storm should be forfeited, because its revenue laws were thereby violated; it would then deserve consideration, whether the underwriters would not be liable for the loss, as an inevitable incident to the shipwreck. At all events, the point is too doubtful, in itself, to justify us in adopting it as the basis of any reasoning in the present case. The case before the king's bench was confessedly new, and does not appear upon this point to have been much argued at the bar. It seems to have been decided, principally, upon the ground of the absence of any authority in favor of the assured; and as it appears to us, in opposition to the analogies furnished by other acknowledged doctrines in the law of insurance.

The same question, however, has undergone the deliberate consideration of some of the greatest maritime jurists of continental Europe; and the result at which they have arrived is directly opposite to that of the king's bench. Pothier lays it down as, in his opinion, the clear result of the contract of insurance, that the underwriters are bound to pay, not only the direct loss occasioned by any peril insured against, but all the expenses which follow as a consequence therefrom. Pothier, *Traité d'Assurance*, n. 49. Estrangin, a very excellent modern commentator upon Pothier (Estrangin's note), asserts that there is not the slightest doubt on the subject. Emerigon, whose reputation as a writer on the law of insurance is second to no one, unequivocally adopts the same opinion. Emerig. *Assur.* ch. 12, § 14, p. 414-17. In short, all those learned foreigners hold the doctrine, that whenever the thing insured becomes by law directly chargeable with any expense, contribution or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution or loss. And this they hold,

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not upon any particular provisions of the French ordinance, but upon the general principles of law applicable to the contract of insurance. In our opinion, this is the just sense and true interpretation of the contract.

It has been suggested, that there is a difference between our policies and the French policies; the latter containing an express enumeration of fortuitous collision, or running foul (*abordage fortuit*), as a peril insured against; while in our policies it falls only under the more general head of "perils of the sea." But this furnishes no just ground for any distinction in principle. The reasoning, if any, to be derived from this circumstance, would seem rather to apply with more force in favor of the plaintiff, since, even when the risk of collision is specifically enumerated, the expenses and contribution attendant upon it are treated as inseparable from the direct damage to the vessel itself, as a part of the loss. In short, whether a particular risk is specified in terms, or is comprehended in the general words of the policy, the same result must arise, viz., that the underwriters are to bear all losses properly attributable to that peril; and no other losses.

It may be proper to remark, that the rule which we here adopt, is just as likely, in actual practice, to operate favorably as unfavorably to the underwriters. If, by the collision, the *Paragon* had been sunk, and the galliot saved, the underwriters would have had the entire benefit of the reciprocity of the rule. It would sound odd, that in such a case, the underwriters should be entitled to receive the full benefit of the Hamburg law for their own indemnity; and yet in the opposite case, that they should escape from the burden imposed by that law.

In all foreign voyages, the underwriters necessarily have it in contemplation that the vessel insured must, or at least may, be subjected to the operation of the laws of the foreign ports which are visited. Those very laws may, in some cases, impose burdens, and in some cases, give benefits, different from our laws; and yet there are cases under policies of insurance, where it is admitted, that the foreign law will govern the rights of the parties, and not the domestic law. Such is the known case of a general average, settled in a foreign port, according to the local law; although it may differ from our own. *Simonds v. White*, 2 Barn. & Cres. 805. In the present

case, the policy was on time, and the vessel had, as it were, *a roving
*113] commission to visit any foreign port; and of course, might well be presumed, at different periods, to come under the dominion of various codes of laws, which might subject her to various expenditures and burdens. The underwriters have no right to complain, that when those expenditures and burdens arise from a peril insured against, they are compelled to pay them; for they were bound to have foreseen the ordinary incidents of the voyage. Suppose, a vessel injured by the perils of the sea, puts into a foreign port to repair, and the license to repair, or the repairs themselves, are burdened with a heavy revenue duty; no one will doubt, that the charge must be borne by the underwriters, as an expense incident to the repair: and yet it might truly be said, not to be the natural result of the peril, but only a charge imposed by law, consequent thereon.

Upon the whole, we are of opinion, that it be certified to the circuit court, that in this case the contributory amount paid by the *Paragon*, on account of the collision, was a direct, positive and proximate effect from

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the accident, in such sense as to render the defendants liable therefor upon this policy.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and on the point and question on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such cases made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that, "in this case, the contributory amount paid by the Paragon, on account of the collision, was a direct, positive and proximate effect from the accident, in such sense as to render the defendants liable therefor upon this policy." Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court.

*JAMES ATKINS, Appellant, v. N. & J. DICK & COMPANY, [*114
Appellees.

Injunction.—Parties.

A bill for an injunction was filed, alleging that the parties who had obtained a judgment at law for the amount of a bill of exchange, of which the complainant was indorser, had, before the suit was instituted, obtained payment of the bill from a subsequent indorser, out of funds of the drawer of the bill, obtained, by the subsequent indorser, from one of the drawers. It was *held*, that it was not necessary to make the subsequent indorser, who was alleged to have made the payment, a party to the injunction bill.

In such a bill, an allegation that the amount due on the bill of exchange was paid, is sufficient; without stating the value or nature of the effects out of which the payment was made.

If there be any one ground upon which a court of equity affords relief, it is an allegation of fraud, proved or admitted.

APPEAL from the Circuit Court for the Southern District of Mississippi. On the 24th June 1834, Cain & Lusk, merchants of Alabama, drew a bill of exchange for \$2405, on Martin Pleasants & Company, of New Orleans, in favor of the appellant, James Atkins. This bill was indorsed by James Atkins to Parham N. Booker, and was afterwards indorsed to N. & J. Dick & Company, the appellees. The bill was protested, and the appellees brought a suit against James Atkins, in the circuit court of the United States for the district of Mississippi, to May term 1838, and recovered a judgment for \$3225. Execution was issued on the judgment, and a levy was made on the property of James Atkins; who, in redemption of the same, gave a forthcoming bond, with sureties, for the delivery of the property to the marshal on the day of sale. The property not having been delivered according to the provisions of the bond, the marshal returned the bond as forfeited; whereby, according to the laws of the state of Mississippi, it became, in force and effect, a judgment against the obligor and his sureties. The appellant, in order to stay execution on the bond against himself and the sureties, filed a bill on the equity side of the court, and obtained an injunction against the obligees in the bond.

The bill stated, that since the giving of the forthcoming bond by the appellant, and his sureties, he had ascertained, and did verily believe, that N. & J. Dick & Company had been paid the money mentioned in the bill of

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exchange, before the institution of the suit on the same ; but that he had no knowledge of this, on the giving on the forthcoming bond and its forfeiture ; that he was advised and believed, that the bill of exchange was paid to N. & J. Dick & Company, by Parham N. Booker, before the action was brought against him on the bill ; and that the same was paid, because of *effects placed in the hands of Booker, by Lusk, one of the drawers *115] of the bill. That he was advised and believed, that he would have had a good and meritorious defence against Booker, on account of the effects placed in the hands of Booker by Lusk, had Booker brought an action against him in his own name ; and he charged, that the names of N. & J. Dick & Company had been used to defeat him in such a defence.

The defendants, the appellees, demurred to the bill, and alleged the following causes of demurrer. 1. It is alleged in the bill, as a substantive, and the original, ground for injunction of the statutory judgment therein named, that one Parham N. Booker, is the actual, and not the nominal plaintiff in said judgment ; that as indorser of the bill of exchange (the basis of the judgment), next after the complainant as the first indorser, having paid the amount of the bill to the holders, received certain effects of the drawers, whose amount ought to be credited to complainant ; and yet the said Booker is not impleaded as a defendant. 2. Nor is the amount, or value, or nature of the effects, so charged to have been paid to the second indorser, specified in said bill ; nor what part or portion was discharged, nor whether any of such effects proved productive. 3. The said bill contains no matter or grounds whereon the court can grant the relief prayed therein.

The court ordered, adjudged and decreed, that the demurrer to the bill be sustained, and that the complainant have leave to amend his bill. It was further ordered, adjudged and decreed, that the injunction be dissolved. The complainant declined making any amendment to the bill, and put the cause down for a further hearing upon the bill and demurrer ; and after argument heard, it appearing to the satisfaction of the court, that Parham N. Booker was materially interested in the issue of said cause, and that the said Booker had not been made a party to the same, it was, therefore, ordered, adjudged and decreed, that the said bill be dismissed for want of proper parties to the same, &c.

The case was argued by *Cocke*, for the appellants ; and by *Crittenden*, for the appellees.

For the appellants, it was contended—1. That this being an injunction bill, and Booker being no party to the proceedings at law, he was not a necessary or proper party to the injunction bill. 2. That the fraud charged should have been denied by answer ; and that the court below, in sustaining the demurrer and dismissing the bill, was guilty of manifest error. 3. That Booker's rights and remedies, whatever they might be, were separate and independent, and purely legal. 4. On sustaining the demurrer, the injunction ought not to have *been dissolved ; but leave given *116] to bring the other parties before the court.

Cocke stated, that he was aware, that it is a rule in equity, that all persons materially interested in a suit ought to be made parties. But the court will always look to the object of the suit, in determining the question of the

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necessary parties to it. 49 Law Library, 6, 7. It is no part of the object of this bill to affect the liability of Atkins to Booker, on Atkins's indorsement to him. Booker's rights and remedies would remain unaffected by a decree of perpetual injunction of N. & J. Dick & Company. On the subject of the rule of proper parties to a bill, a court of equity will not suffer it to be applied, to defeat the purposes of justice; if the case can be disposed of without prejudice to the rights or interests of persons who are not made parties. A court of equity will not require persons to be made parties, where the circumstances of the case do not warrant it. Story's Equity Pleadings 78, and the authorities there stated.

This is not an original bill. In an injunction suit, no objection can be taken on the ground that absent persons are not made parties. 49 Law Library 53. Whatever rights Booker may have, either at law or in equity, are predicated upon the liabilities of Atkins to Booker, on Atkins's indorsement to him. Each indorsement is in the nature of a new bill; it constitutes a paramount, separate, distinct and independent contract. Intermediate indorsers or indorsees are not necessary parties in equity: their remedies are on the bills of exchange, or promissory notes, and at law. 50 Law Library 151; *Ward v. Van Bokkelen*, 2 Paige 289; *McCarty v. Graham*, 2 Simons 285; 2 Atk. 235. The merits of the case between Atkins and N. & J. Dick & Company can be determined, without affecting the interest of Booker; and it is the duty of the court to decree between the parties before them. *Russell v. Clarke's Executor*, 7 Cranch 69. Booker's rights could not be affected by the decree of perpetual injunction against N. & J. Dick & Company. *Wendell v. Van Rensselaer*, 1 Johns. Ch. 341; 7 Conn. 427; *Joy v. Wirtz*, 1 W. C. C. 517. He was not named as a party defendant, nor was process prayed against him, or his interest to be affected. He was, therefore, no proper party. *Verplanck v. Mercantile Insurance Company*, 2 Paige 438; *Executors of Brasher v. Van Cortlandt*, 2 Johns. Ch. 245; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280; *Lyle v. Bradford*, 7 T. B. Monr. 113. There was nothing demanded of Booker, and therefore, he should not be made a party. *Kerr v. Watts*, 6 Wheat. 550.

Had Booker been made a party in equity, he could have claimed that he was not a party in the suit at law. That his rights were purely legal, distinct, separate and independent, confined *alone to Atkins's indorsement to him, and have claimed to be restored to his remedy at law; [*117 and it would have been allowed to him. 2 Story's Equity Pleading, p. 172, § 885; p. 173, § 887; *Marine Insurance Company v. Hodgson*, 7 Cranch 336. If the suit at law of N. & J. Dick & Company against Atkins, was really for the use of Booker, his name should have been placed on the record as the *cestui que use*; by concealing his connection with the suit, he has no right to shift the *onus probandi* as to the matters in litigation, or to have the advantages which his situation, as a defendant in chancery, would give him. This would be a fraud on Atkins's defence against Booker, at law. Courts of equity would never allow the success of such a fraud. The demurrer is in bad grace; and it may be worthy of inquiry, upon what principles do N. & J. Dick & Company demur? It would be against conscience to execute a judgment at law, thus situated. *Marine Insurance Company v. Hodgson*, 7 Cranch 332. The fact is, Booker can only be

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used in the injunction case, as a witness. *Fenton v. Hughes*, 7 Ves. 287; 1 S. C. 73-4.

The bill insinuates that Booker is the instigator, and it may be, that he may be an unwilling witness; but Atkins is entitled to the answer of N. & J. Dick & Company, and the testimony of Booker. If it be true, as charged, that the bill of exchange has in fact been paid; it matters not by whom, or how; the right of N. & J. Dick & Company to have an action against for the money, was gone, both at law and in equity. They have no right to be paid twice. If they could have no action for themselves, it is difficult to perceive, upon what principle they could have an action for another. By the payment of the bill of exchange, it was cancelled by law. It is time enough for Atkins to litigate his rights with Booker, both at law and in equity, when Booker shall sue Atkins, on Atkins's indorsement to Booker. It is, therefore, claimed, that the decree of the court below should be reversed; the demurrer be overruled; and leave granted to N. & J. Dick & Company to answer the bill.

Crittenden, for the appellees, contended, that the bill of the appellants was properly dismissed by the circuit court, for want of proper parties, and for want of equity. The circuit court allowed the complainant to add proper parties; but this he refused, and went on, notwithstanding this permission. According to the allegations of the bill, not only Parham N. Booker, but all the sureties in the forthcoming bond given to the marshal, should have been made parties to the suit, according to their interest in relation to the matters alleged in it; and in order to enable the court to settle at once the whole controversy. *McIntire v. Hughes*, 4 Bibb 187; 3 T. B. Monr. 398; 4 Ibid. 386; 3 J. J. Marsh. 44; *Macey v. Brooks*, 4 Bibb 238; *Turner v. Cox*, 5 Litt. 175; *Cummins v. Boyle*, 1 J. J. Marsh. 481.

*[118] The whole equity asserted by the appellants grows out of the acts of others than those of N. & J. Dick & Company. It is alleged, that Booker is now prosecuting the suit on the bill of exchange, in the name of N. & J. Dick & Company; and yet he is not made a party. The assignor of a judgment, when a bill is filed against the parties to the judgment, must be made party to the bill. The proceeding here is against an alleged nominal party; and yet the real party is not allowed an opportunity to be heard. If the appellant is successful in this proceeding, Booker will not be prevented suing on the bill of exchange, if he gets possession of it. Thus, the controversy between the parties to the bill of exchange will not be settled by the present proceeding.

BARBOUR, Justice, delivered the opinion of the court.—This is an appeal from a decree of the circuit court of the United States for the southern district of Mississippi. The appellant was the payee of a bill of exchange drawn by Cain & Lusk, which he indorsed to Parham N. Booker, who indorsed it to N. & J. Dick & Company. The bill having been dishonored, Dick & Company brought suit thereon, and recovered a judgment against Atkins, the first indorser. Upon this judgment an execution was issued, a forthcoming bond was taken and forfeited; by reason whereof, the bond, according to a statute of Mississippi, had the force of a judgment, on which execution was issued. Atkins thereupon filed his bill in equity, in which he alleged, that he had ascertained, and verily believed, that Dick & Company

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had been paid the amount of the bill of exchange, before the institution of their suit against him ; but that he had no knowledge of it, at the time of the giving and forfeiture of the forthcoming bond. That he was advised, and verily believed, that the bill of exchange was paid to Dick & Company, by Parham N. Booker, before the suit was brought ; and that it was paid, because of effects placed in the hands of said Booker by Lusk, one of the drawers of the bill of exchange. That he was advised and believed, that he would have had a good defence against Booker, on account of said effects received by him from Lusk, with which to pay the bill, in case said Booker had sued in his own name thereon. That the names of Dick & Company were used, with the intent to defeat him of that defence, in case he became advised that said effects had been placed in the hands of Booker by Lusk, with which to pay and satisfy the bill. The bill charged, that in these proceedings the appellant had been most palpably defrauded ; and that in order to consummate the fraud, Dick & Company had caused execution to issue on the judgment created by the forfeited forthcoming bond, which was then in the hands of the marshal ; and it prayed an injunction, a perpetuation thereof, and for general relief. An injunction was granted. The defendants demurred *to the bill, assigning three causes of demurrer, [*119 to wit : 1. That Booker was not made a party. 2. That neither the amount, nor the value, nor the nature of the effects, charged in the bill to have been paid to the second indorser, were specified ; and that it was not stated what part or portion was discharged, nor whether any of such effects proved to be productive. 3. That the bill contained no matter or ground on which the court could grant the relief prayed for. The court sustained the demurrer, and gave the plaintiff leave to amend his bill ; and he declining to make any amendment, they dissolved the injunction, and dismissed the bill for want of proper parties. From this decree, this appeal was taken.

The defendants having demurred to the bill, in the consideration of the case, we are to take all its allegations to be true. The bill is somewhat inartificially drawn ; but it substantially alleges, that before the institution of the suit at law against the plaintiff, the amount of the bill of exchange in question had been paid to Dick & Company, by means of effects furnished by one of the drawers. The particular language of the allegation is, that it was paid to them, because of effects placed in the hands of Parham N. Booker, by Lusk, one of the drawers. Now, we understand the import of this to be, that these effects constituted the means by which the payment was effected ; whether Booker sold the effects, and paid the bill out of the proceeds of the sale, or detained them himself, and in their stead advanced their value in money, is an inquiry of no moment ; because, in either aspect of the case, the effect would be, that the bill was paid, by means furnished by one of the drawers. And upon this state of facts, it is clear, that the same operation which satisfied the claim of Dick & Company, at the same time, extinguished all the rights as well as liabilities growing out of the bill of exchange ; because they, being the last indorsees, were the persons entitled to receive the amount of the bill ; and the drawers being liable to every other party, and the funds by which the payment was effected being furnished by them, there was no longer any person who could have a claim against any other, founded upon a bill thus paid.

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Upon this view of the subject, the question is, whether a party who has received payment of his debt, shall be permitted by a court of equity to avail himself of a judgment at law, to enforce a second payment ; and that too, against a party who did not know of that payment, until after the judgment was obtained. To state such a proposition, is to answer it.

The bill further charges the defendants with fraud, and this, too, is admitted by the demurrer. If there be any one ground upon which a court of equity affords relief with more unvarying uniformity than on any other, it is an allegation of fraud, whether proved or admitted. Whilst, therefore, a case stands before us upon such a bill and demurrer, we cannot hesitate to say, it must be considered as entitling the party to the aid of a court of equity.

*It is contended, that Booker ought to have been made a party. *120] And the ground taken is (and this is the first cause of demurrer assigned), that every person ought to be made a party who has an interest in the subject of controversy ; and it is said, that Booker is in that situation. We think that he has no interest in the object of this suit ; in other words, that he is not interested in the question between these parties. The ground of equity is, that Dick & Company, the plaintiffs in the judgment at law, received payment of the amount recovered by them, before they brought their suit. Now, if he were made a party at all, it must be as defendant. But the plaintiff neither sought, nor could he obtain, any decree against him. He only asked a perpetual injunction against Dick & Company, on the ground of an equity attaching upon them personally. If the plaintiff should prevail against them, it would be upon the ground, that the amount of the bill had been paid to them by the drawers ; supposing that to be the case, then Booker would not be liable to them as indorser. If, on the contrary, the plaintiff should fail, Booker's rights would in nowise be concluded or affected ; but if, as indorser, he should be made liable to Dick & Company, then, as indorsee, he could recover against the plaintiff, Atkins, as indorser to him.

But again, Booker's right and liability upon the bill are at law. We cannot, therefore, perceive any ground upon which, in a contest between two parties to a bill, founded upon an allegation of equity attaching personally to one of them, a third party can be brought into a court of equity to mingle in that litigation, when the attitude in which he stands is purely legal. If the equity attached to him, then he ought to be made a party ; but as it does not, a court of equity is not the *forum* in which to discuss or to decide either his right or liability. A very familiar case will illustrate this principle. Suppose, an obligee to assign a bond, on which the assignee recovers a judgment, where, by statute, he may sue in his own name ; and that the obligor thereupon files his bill in equity, praying for a perpetual injunction, on the ground of some equity attaching upon the obligee, before the assignment. In such a case, the assignor must be made a party, because he is directly interested in deraining the equity alleged to exist against him. But if, on the contrary, the bill were filed upon the ground of some equity not existing against the assignor, but arising between the obligor and assignee, after the assignment, then there would be no pretence for saying, that the assignor ought to be a party ; plainly, because, in that particular question, he has no interest whatsoever. Which-

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ever way that question may be decided, the relation between the assignor and assignee, and the liability of the former to the latter, growing out of the assignment, are purely questions of law; wholly unaffected by the decision of the case in equity.

The second ground of demurrer is, that neither the amount, nor value, nor nature of the effects charged to have been paid, is specified; nor is it stated what portion of the debt was discharged, nor whether any of such effects proved to be productive. This cause* of demurrer we consider altogether untenable. The allegation in the bill is, that the [*121 money mentioned in the bill of exchange was paid to Dick & Company. This allegation covers the whole equity of the case; because it asserts that there was a payment, and that, a payment of the money mentioned in the bill; that is, the whole amount of the bill.

The third cause of demurrer, that there is no ground laid in the bill for relief, has been already discussed; and we have shown that the bill does contain sufficient allegations to entitle the complainant to the aid of a court of equity.

We are of opinion, that the circuit court, instead of sustaining the demurrer, ought to have overruled it; and ordered the defendants to answer. The decree is therefore reversed, and the cause remanded to the circuit court, to be proceeded in, in conformity with this opinion, and as to equity and justice shall pertain. Decree reversed.

*GEORGE RUNYAN, Plaintiff in error, v. The Lessee of JOHN G. COSTER and THOMAS K. MERCIEN, who survived JOHN HONE, Defendant in error. [*122

Power of corporation to hold lands in another state.

The legislature of the state of New York, on the 18th of April 1823, incorporated "The New York and Schuylkill Coal Company;" the act of incorporation was granted for the purpose of supplying the city of New York and its vicinity with coal; and the company having, at great expense, secured, by purchase, valuable and extensive coal lands, in Pennsylvania, the legislature of New York, to promote the supply of coal as fuel, granted the incorporation, with the usual powers of a body corporate, giving to it the power to purchase and hold lands, to promote and attain the objects of the incorporation; the recitals in the act of incorporation showed, that this power was granted with special reference to the purchase of lands in the state of Pennsylvania. The right to hold the lands so purchased depends on the assent or permission, express or implied, of the state of Pennsylvania.¹

The policy of the state of Pennsylvania, on the subject of holding lands in the state by corporations, is clearly indicated by the act of its legislature of April 6th, 1833. Lands held by corporations of the state, or of any other state, without license from the commonwealth of Pennsylvania, are subject to forfeiture to the commonwealth; but every such corporation, its feoffee or feoffees, hold and retain the same, to be divested or dispossessed by the commonwealth, by due course of law. The plain interpretation of this statute is, that until the claim to a forfeiture is asserted by the state, the land is held subject to be divested by due course of law, instituted by the commonwealth alone, and for its own use.²

¹ In harmony with the general law of comity among the states composing the Union, the presumption is to be indulged, that a corporation, if not forbidden by its charter, may exercise the powers thereby granted, within other states, including the power of acquiring lands, unless prohibited therefrom, either in their

enactments, or by their public policy, to be deduced from the general course of legislation, or the settled adjudications of their highest courts. *Christian Union v. Yount*, 101 U. S. 353.

² Restrictions imposed by the charter of a corporation upon the amount of property that

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The supreme court of Pennsylvania having decided, that a corporation has, in that state, a right to purchase, hold and convey land, until some act is done by the government, according to its own laws, to vest the estate in itself, the estate may remain in a corporation so purchasing or holding lands; but such estate is defeasible by the commonwealth. This being the law of Pennsylvania, it must govern in a case where land in Pennsylvania had been purchased by a corporation created by the legislature of New York, for the purpose of supplying coal from Pennsylvania to the city of New York. *Fairfax v. Hunter*, 7 Cranch 621, cited with approbation.

In the *Bank of Augusta v. Earle*, 13 Pet. 584, and in various other cases decided in the supreme court, a corporation is considered an artificial being, existing only in contemplation of law; and, being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. Corporations created by statute must depend, for their powers, and the mode of exercising them, upon the true construction of the statute.

A corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law, and by force of the law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty; but although it must live and have its being in that state only, yet it does not follow, that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. The corporation must show that the law of its creation gave it authority to make such contracts; yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made; it is sufficient, that its existence, as an artificial person, in the state of its creation, is acknowledged and recognised by the state or nation where the dealing takes place; and that it is permitted by the laws of that place to exercise the powers with which it is endowed.

Every power which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; a corporation can make no valid contract, without the sanction, express or implied, of such sovereignty, unless a case should be presented in which the right claimed by the corporation appears to be secured by the constitution of the United States.

*123] ***ERROR** to the Circuit Court for the Eastern District of Pennsylvania. This was an action of ejectment, brought in the circuit court of the district of Pennsylvania, by the defendant in error, the lessee of John S. Coster and Thomas K. Mercien, citizens of New York, for the recovery of a tract of land in Norwegian township, Schuylkill county, Pennsylvania. The defendant in the circuit court was in possession of the land.

The title of the lessors of the plaintiff below was founded on a patent from the commonwealth of Pennsylvania, dated December 23d, 1824, to Benjamin Pott, granting three hundred acres of land to him, in Schuylkill county; a survey of the land, and a deed executed on the 17th of March 1830, by which the patentee conveyed the land to John G. Coster, John Hone, Moses Jaques and Thomas K. Mercien, of the city of New York, trustees for the stockholders of the corporation known under the name of the New York and Schuylkill Coal Company, as well for such persons as were then stockholders, as for such persons as might afterwards become stockholders. The New York and Schuylkill Coal Company was incorporated by the legislature of New York, on the 18th of April 1823. Moses Jaques, one of the trustees, by direction of the company, conveyed the right and interest in the land held by him under the deed from Benjamin

it may hold, cannot be taken advantage of, collaterally, by private persons, but only in a direct proceeding by the state which created

it. *Jones v. Habersham*, 107 U. S. 188, and cases there cited.

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Pott and wife, to the other trustees, on the same uses and trusts. The lessors of the plaintiff in the circuit court, survived John Hone.

The defendant below, without offering any evidence, insisted and prayed the court to charge the jury that the plaintiff, upon evidence, was not entitled to recover; but the court gave the contrary direction. The jury having given a verdict for the plaintiff below, in conformity with the directions of the court, and a judgment having been entered on the same, the defendant prosecuted this writ of error.

The case was argued by *C. J. Ingersoll*, for the plaintiff in error; and by *Budd*, with whom was *Sergeant*, for the defendant.

Ingersoll, for the plaintiff in error, said, that the case of the *Bank of Augusta v. Earle*, 13 Pet. 587, rendered much argument unnecessary. From that case, he gathered: 1. That corporations are local as well as artificial bodies; 2. With no powers but what charters create; 3. Especially, no extra-territorial powers, but by comity; 4. That although courts may award the comity of the state; 5. Yet it must not be contrary even to the policy or the interest of the state; still less, its law, written or common; 6. That corporations may act extra-territorially, by agents. Whether his was *the burden of disproving the comity, might be questioned; but he assumed it so far, to show the general rule of Pennsylvania; if [*124 the defendant appeals to an exception, let him show it.

The law, as settled in 13 Peters, turns on personalty. This is a case of realty; and all legislation is jealous, and jurisprudence exclusive, as to land. Story's Conflict of Laws 363; *Jackson v. Ingraham*, 4 Johns. 182; *United States v. Crosby*, 7 Cranch 115; *Beaty v. Knowler*, 4 Pet. 168. The law of the state of Pennsylvania is deeply imbued with this principle; even in cases in which corporate powers are not involved. *Williams v. Maus*, 6 Watts 278. By universal law, title to land begins with the government of its locality; and all tenures depend on it. Not only title, but disposal. In Pennsylvania, the English mortmain acts are in full force. 3 Binn. 626; 2 Penn. Bl. 40; the case of the *Methodist Church*, 1 Watts 218. By recent act of assembly, these mortmain exclusions are re-inforced. Acts of 6th April 1833.

Thus, the general rule is shown; and the question is driven to an exception. It has been adjudged in Pennsylvania, that corporations may take, though they cannot hold. *Leazure v. Hillegas*, 7 Serg. & Rawle 313. But this case does not bind as a judgment on the case in argument, because the former was a case of domestic, not foreign corporation. The argument of that case is not to be a judgment to bind this; and that argument is wrong, for by common law, corporations may not take. To do so, is not of their nature, as asserted by Chief Justice TILGHMAN. 1 Bl. Com. 475; Co. Litt. 40. Indeed, the English mortmain acts are but declaratory of the common law. Ang. & Ames on Corp. 80. All law, the original Roman, the English and the American, require that bodies of land shall not be held in mortmain. 2 Kent's Com. 269-83. Nor is mortmain confined to superstitious or religious tenure, but all holding by anybody. Such is the statute, 7 Edw. I., c. 2., A. D. 1279, enlarging Magna Charta of 1217. See Highmore's History of Mortmain, and Rees's Cyclopædia. The law of mortmain forbids all holding of lands by artificial bodies. And to talk of English common law

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before 1279, is to recur to ages when we cannot ascertain what law was. 1 Reeve's History of English Law, ch. 5, p. 229.

Nor is English common law the common law of Pennsylvania; but the English law adopted as it was adapted. *Carson v. Blazer*, 2 Binn. 484. Judge Read, in his *Pennsylvania Blackstone*, 1 vol. 261, and 2 vol. 40, is explicit, that there is no common law in that state, but as adopted and modified; and no corporation, but as chartered; no common-law corporation whatever.

Moreover, there is no analogy, as supposed, between the corporative capacity and that of aliens, to take land and hold till ousted; because aliens are presumed to be capable, till the contrary is shown. *Gouverneur v. Robertson*, 11 Wheat. 356. The act of incorporation of this company, is *125] thoroughly New York. A law of New York, sess. 46, ch. 184, p. 217, authorized it to hold \$500,000 worth of land in Pennsylvania, for the benefit of the city of New York; a sum that would buy a county, perhaps a state. Such act is void, not merely voidable; and void, whether the hold it gives over land in Pennsylvania be conferred on a body corporate, or on an individual.

Budd, for the defendants in error, contended, that if their title were directly in a corporation, not authorized to hold lands in Pennsylvania; still the position of the plaintiff is untenable, because the requisitions of the law to divest a title of that description, have not been complied with. Even under the statutes of mortmain, a corporation can take, although it cannot hold, land, as against the state. The corporation acquires, and may convey "a fee-simple, defeasible by the commonwealth" alone; and until an escheat be regularly effected, it possesses all the rights and remedies incident to ownership. The right on the part of the state to enter, does not exist until office found. *Leazure v. Hillegas*, 7 Serg. & Rawle 313; *Baird v. Bank of Washington*, 11 Ibid. 418. In both of these decisions, the case of an alien is considered as analogous to that of a corporation; and the doctrine in *Fairfax v. Hunter's Lessee*, 7 Cranch 618, is adopted. There is no interval between the grant to the corporation, and the completion of the escheat, in which a trespasser can intrude. The plaintiff is really adverse to the state; and his success here would impair its rights, if any exist, which for the purpose of the present occasion he professes to vindicate. If the title be void, as is contended, then it never vested in the corporation, nor in trustees for the use of the corporation; consequently, the right of escheat cannot exist. It is, therefore, essential that the state should be able to trace the title to the corporation. Possession by the corporation is also important, for the purpose of the escheat; for how can it be effected, when the person in possession does not claim under a corporation?

The right of possession being in the corporation, the right to sue to recover it, must also exist. In *Leazure v. Hillegas*, the plaintiff was alienee of the corporation, and his right to sue was sustained. The right to sue is essential to the protection of all other rights. The doctrine, that the rights of a corporation to sue, out of the place of its locality, arises from comity, and cannot exist in opposition to the laws of the state in which the suit is instituted, is inapplicable to the present case; for there is, in Pennsylvania, no such prohibition; and the escheat laws evidently admit the existence

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of rights in corporations, over lands which they are not licensed to hold ; which courts will aid them to enforce as against strangers. No authority has been adduced to sustain that distinction between domestic and foreign corporations. *Methodist Church v. Remington*, 1 Watts 218, is a construction of the act of assembly of 1730, relating exclusively to religious societies ; and the case in 6 Watts 280, *refers to the exercise of judicial authority, and not to the voluntary appointment of trustees. [*126

The act of assembly of the 6th of April 1833, which has been relied upon by the opposite counsel, prescribes a mode of proceeding which must be pursued, before any argument derived from it can be sustained. It makes no distinction between domestic and foreign corporations. The right of a corporation to hold and retain the land, subject to be divested or dispossessed at any time by the commonwealth, according to due course of law, is conceded by the preamble. Her title is to be established, and her right authenticated by "solemn matter of record," which is the only evidence of the right of the state. Even after the inquisition directed by the first and the fifth sections, no power exists in any officer of the state, to declare the land forfeited ; but the proceedings are to be reported to the legislature. It is consistent with the spirit of the act, to suppose, that as the corporate franchise, and not the corporators, was the object of hostility, no course detrimental to the latter would be pursued ; but only such measures operating on the officers of the company as would prevent future attempts to exercise corporate authority in the state. The second section contains a clause, which the defendants in error, if they were at any time within the prohibition of the law, would claim the benefit of before the inquest. The place and form of the trial, and the officer to conduct it, are prescribed ; and it is incompetent for the plaintiff in error to make a different selection. A reward to informers is prohibited, and it is made the duty of a public officer to collect the evidence, thereby excluding the interference of strangers. But if the act were adverse to the defendants, as their title was acquired prior to its passage, it should not be construed as having a retrospective operation, to their injury.

But the disability of corporations is not, in the present suit, a consideration of the great importance which has been ascribed to it ; as the defendants in error are trustees, and hold the legal title, which is all that is requisite in the action of ejectment. 9 Johns. 60. It is of no importance, in a controversy with a stranger, for whom they hold. But it is said, that the trust is void. If it be so, what becomes of the legal estate ? It cannot revert to the grantor, for he has received a valuable consideration for it. If there be a trust resulting by implication of law, would it not be for those who paid the purchase-money ? Or if the trust be void, would not the trustees hold the land discharged of the trust ?—a doctrine which is sanctioned by the case of the *Attorney-General v. Sir George Sands*, Hardr. 495 ; 4 Kent's Com. 426. In either event, the title of the defendants in error would be unassailable. In the case of an alien, it has been determined, "that the king cannot be entitled on inquisition ; for the estate in law is in the trustee, not in the alien, but he must sue in chancery to have the trust executed." 1 Com. Dig. 559. The commonwealth, therefore, could not acquire title, until the legal estate had vested in the corporation. [*127

*The plaintiff in error had no claim to the consideration of a court of

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equity, but that defect in his case cannot aid him in a court of law. He cannot ask the court to look beyond the legal title, that he may discover and be assisted by a weakness in the trust, the investigation of which is foreign to the purpose of the action of ejectment. The argument that the trust is void and extinguished, if correct, would, in the present action, at least, leave the legal estate unaffected; and in any other proceeding, the defendants in error are prepared to show such a conformity to the laws of Pennsylvania, as will be amply sufficient for their protection. That a mode exists, or can be devised, by which a trust for a corporation shall not protect the estate from forfeiture, may be true; but in the prosecution of the remedy, that "due course of law," alluded to in the preamble to the act of assembly of the 6th of April 1833, should never be lost sight of. The right to sue in the federal courts, does not depend on the capability of the *cestui que trust*, as has been repeatedly determined. 4 Cranch 306; 8 Wheat. 642.

The trust in this case was not, as is alleged, created by a corporation, but by Benjamin Pott, the grantor. If it had been, there is nothing in the charter of the New York and Schuylkill Coal Company, which prohibits the creation of trusts; much less is there any prohibition of a contract with trustees holding lands in Pennsylvania, to enable the company more efficiently to prosecute the business for which it was organized.

Having considered the insufficiency of the case of the plaintiff in error, even if the title were in a corporation not licensed to hold lands in Pennsylvania, and also the further obstacle arising from the trust, it will now be proper to inquire into the actual character of the title of the defendants in error. It is denied, that it is a trust for a corporation. If there be any doubt upon this point, it should operate in favor of the defendants; for the court, adopting the usual mode of construction, will give a strict construction to statutes so highly penal as the statutes of mortmain, and the act of assembly of the 6th of April 1833. In resisting an attempt to cause a forfeiture, our conveyance is entitled to the most favorable construction. The title is in trust for the "individual stockholders" of the company, which is a description of persons sufficiently precise. There is no title given to the corporation. The corporation has no control over the property, other than that of ordering sales—an authority designed to aid the execution of the trust, and protect it from abuse. Its officers could neither cut the timber, nor break the soil. It can exercise no authority over the rents and profits. If the charter were to be repealed by the legislature of New York, according to the power reserved in it, or from any other cause, it were to cease to exist, the title would not be affected by it. The assistance of the directors in effecting sales could be dispensed with; and thus the only connection between the trustees and the corporation be terminated. The latter clause of the trust refers to the charter, not for the purpose of deriving authority from it, but merely to designate *and ascertain the correct organization of the body which is to exercise the authority given by the deed of trust. As the power to sell is derived from the deed of trust, and not from the charter, the phrase "in virtue of their charter," can have no other meaning. It is an authority designed to save the trust from abuse. It might be exercised by a stranger. Suppose, a trust for an infant, and the trustee is authorized to sell, as directed by a corporation or an alien, would

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the title be in the corporation or alien? If the authority to superintend sales had been given to any other corporation, would the title have been in it, and not in the trustees, for the use of the individual stockholders of the New York and Schuylkill Coal Company? How can it be said, that the corporation holds the land, or that it is held in trust for it, when the trust is expressly declared to be for the individual stockholders; and the connection with the corporation is limited to an authority to order sales, the existence of which power, as it may be exercised by the stockholders, is not essential to the execution of the trust. But it is averred, that the trust is illegal and void, although it be for an unincorporated association; but no authority has been referred to which sustains the position: *Remington v. Methodist Church*, as has already been stated, relating exclusively to religious associations. The defendants do not claim to derive title under any statute of New York, or any corporation chartered by that state; but from a conveyance executed in conformity to the laws of Pennsylvania.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up on a writ of error from the circuit court of the United States for the eastern district of Pennsylvania. It is an action of ejectment, brought to recover possession of about two hundred and thirteen acres of land, in the township of Norwegian, in the county of Schuylkill. Upon the trial, the lessors of the plaintiff gave in evidence a warrant issued by the secretary of the land-office, in the commonwealth of Pennsylvania, authorizing a survey for Benjamin Pott, for the quantity of land applied for by him bearing date the 23d of December, in the year 1824. And also a survey of the land, containing two hundred and thirteen acres and fifteen perches, accepted on the 11th August 1825, embracing the land in controversy; together with a deed from Benjamin Pott and his wife, to John G. Coster, John Hone, Moses Jaques and Thomas K. Mercien, for the same premises, bearing date the 17th of March, in the year 1830, conveying to them in fee-simple the said lands, upon certain trusts therein specified, to the sole use and behoof of the several individual stockholders of the corporation known under the name, style and title of the New York and Schuylkill Coal Company. And further gave in evidence, a deed from Moses Jaques, one of the trustees, to John G. Coster and Thomas Mercien, the two surviving trustees named in the last-mentioned deed, bearing date the 25th of July 1837, releasing and conveying to his said co-trustees, in fee-simple, all his right, title, interest and trust, in law *or equity, in the premises, to have [*129 and to hold the said tract of land, to them, their heirs and assigns for ever; to such uses, and upon such trusts, as are mentioned and contained in said deed. The death of John Hone, one of the trustees named in the first-mentioned deed, having been proved, and that the defendant, John Runyan, was in possession of the premises, when the suit was commenced, the plaintiff rested the cause; and thereupon, the defendant, without offering any evidence, insisted and prayed the court to charge the jury that upon this evidence, the plaintiff was not entitled to recover. The court refused to give such charge; but, on the contrary, directed the jury that the plaintiff was entitled to recover; whereupon, the defendant tendered a bill of exceptions.

The question presented by this bill of exceptions is, whether the lessors

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of the plaintiff, being trustees of a corporation in the state of New York, could, under the laws of the state of Pennsylvania, take the estate conveyed by Benjamin Pott and his wife to the trustees of that incorporation. If the lessors of the plaintiff had the legal estate in the premises in question vested in them, their right to recover followed as matter of course ; nothing having been shown on the part of the defendant to impugn that right.

The rights and powers of a corporation were very fully examined and illustrated by this court, at the last term, in the case of the *Bank of Augusta v. Earle*, 13 Pet. 584. In which case, and in various other cases decided in this court, a corporation is considered an artificial being, existing only in contemplation of law ; and being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. That corporations created by statute must depend for their powers and the mode of exercising them, upon the true construction of the statute. A corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law, and by force of the law ; and that when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty ; but although it must live and have its being in that state only, yet it does not follow, that its existence there will not be recognised in other places ; and its residence in one state creates no insuperable objection to its power of contracting in another. The corporation must show that the law of its creation gave it authority to make such contracts ; yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient, that its existence as an artificial person in the state of its creation, is acknowledged and recognised by the state or nation where the dealing takes place ; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed. Every power, however, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised ; and a corporation can make no valid contract, *without the sanction, express or implied, of such

*130] sovereignty ; unless a case should be presented in which the right claimed by the corporation should appear to be secured by the constitution of the United States.

Under this general view of the rights and powers of a corporation, and the limitation upon the exercise of such powers in places out of the jurisdiction where granted, the application of them to the case now before the Court is the next subject of inquiry. The powers vested in the trustees of the New York and Schuylkill Coal Company, and the right to take the estate, and execute the trusts vested in them by the deed from Benjamin Pott and his wife, will depend upon the act of incorporation by the legislature of New York, of the 18th of April 1823. The recital in that act shows, that the incorporation was granted for the purpose of supplying the city of New York and its vicinity with coal ; and that the company had, at great expense, secured the purchase of valuable and extensive coal lands in the state of Pennsylvania ; and that the legislature being disposed to encourage the development of our internal resources, and being sensible of the importance of a supply of fuel to the city, and for the better security of

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the persons investing their money in an undertaking so extensive, and requiring so large a capital, granted the incorporation, with the usual powers of a body corporate; and giving to the corporation the right to purchase, hold and convey any estate, real or personal, for the use of the said corporation; provided, that the real estate or their interest therein, so to be holden, shall be such only as shall be requisite to promote and obtain the objects of the incorporation. The right to purchase and hold real estate is, therefore, expressly vested in this corporation; and the recitals show that this power was granted with special reference to the purchase of lands in the state of Pennsylvania. And the deeds given in evidence show, that the legal estate in the lands in question is vested in the lessors of the plaintiff, in trust for the stockholders; and the trusts therein declared, are for the purposes of carrying into execution the great and leading object of the corporation. The capacity, therefore, of the lessors of the plaintiff, to take the lands in question, for the use of the stockholders of this corporation, is very clearly shown. And the right to hold the lands must depend upon the assent or permission, either express or implied, of the state of Pennsylvania.

The policy of that state upon this subject is clearly indicated by the act of the 6th of April 1833, relative to the escheat of lands held by corporations, without the license of the commonwealth. It recites, that whereas, it is contrary to the laws and policy of the state, for any corporation to prevent or impede the circulation of landed property from man to man, without the license of the commonwealth; and no corporation, either of this state or of any other state, though lawfully incorporated, can in any case purchase lands within this state, without incurring the forfeiture of said lands to the commonwealth, unless such purchase be sanctioned and authorized *by [*131 an act of the legislature; but such corporation, its feoffee or feoffees, hold and retain the same, subject to be divested or dispossessed, at any time, by the commonwealth, according to due course of law.

The plain and obvious policy here indicated is, that although corporations, either in that or any other state (no distinction being made in this respect), may purchase lands within the state of Pennsylvania, yet they shall be held subject to be divested by forfeiture to the commonwealth. And the act then points out the mode and manner in which proceedings shall be instituted and carried on to enforce the forfeiture; necessarily implying, that until such claim to a forfeiture is asserted by the state, the land is held subject to be divested by due course of law, instituted by the commonwealth alone: and this conclusion is fortified by the provision in the fourth section of the act, that the rights of common informers in relation to escheats, shall not apply to proceedings under this statute. But it is made the exclusive duty of the escheator to prosecute the right of the commonwealth to such lands.

The doctrine of the supreme court of Pennsylvania, in the case of *Leazure v. Hillegas*, 7 Binn. 313, is directly applicable to this case. The question then before the court was, as to the right of the Bank of North America to purchase, hold and convey the lands in question? and the court took the distinction between the right to purchase, and the right to hold lands, declaring them to be very different in their consequences; and that the right of a corporation in this respect was like that of an alien, who has power to take, but not to hold lands; and that although the land thus held by an

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alien may be subject to forfeiture, after office found, yet until some act is done by the government, according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser; but he can convey no estate which is not defeasible by the commonwealth. Such being the law of Pennsylvania, it must govern in this case. But the principle has received the sanction of this court, in the case of *Fairfax v. Hunter*, 7 Cranch 621; where it is said, that it is incontrovertibly settled, upon the fullest authority, that the title acquired by an alien, by purchase, is not divested, until office found.

We do not enter at all into an examination of the question, whether any, and if any, which, of the English statutes of mortmain are in force in Pennsylvania; but place our decision of this case entirely upon the act of that state, of the 6th of April 1833, and the doctrine of the supreme court in the case of *Leazure v. Hillegas*; which we think clearly establish the right of lessors of the plaintiff to hold the premises in question, until some act shall be done by the commonwealth of Pennsylvania, according to its own laws, to divest that right, and to vest the estate in itself. The legal estate is accordingly in the lessors of the plaintiff, and the defendant cannot set up *132] any right of forfeiture which the state of Pennsylvania may *assert. That is a matter which rests entirely in the discretion of that state. The judgment of the circuit court is accordingly affirmed, with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Pennsylvania, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*133] *ISAAC T. PRESTON, Executor of JAMES BROWN, deceased, Plaintiff in error, v. RICHARD R. KEENE, Defendant in error.

Exchange of lands.

A paper was executed by R. R. K., of the city of New Orleans, stating that the grantor, for and in consideration of a certain lot or parcel of land (describing it), conveyed and transferred to J. B. and S. B., all his right, title and interest in a certain tract or parcel of land (describing it), hereby warranting and defending unto the said J. B. and S. B., all his right and title in the same, and unto all persons claiming under them; the paper, called, under the laws of Louisiana, "an act of sale," was signed by R. R. K., J. B., S. B., and a notary of New Orleans, and was deposited in the office of the notary. This was not "an exchange," according to the laws of Louisiana; and J. B. and S. B. did not, by accepting the transfer of the property made by the same, and signing the paper, incur the two obligations imposed on all vendors by the civil code—that of delivering, and that of warranting, the lot of ground sold to R. R. K.—and did not thereby become liable for the value of the property stated in the said "act of sale" to have been given for the property conveyed thereby.

"Exchange," according to the civil code of Louisiana, imports a reciprocal contract; which, by article 1758 of that code, is declared to be a contract where the parties expressly enter into mutual agreements.

An exchange is an executed contract; it operates, *per se*, as a reciprocal conveyance of the thing given, and of the thing received; the thing given or taken in exchange must be specific, and so distinguishable from all things of the like kind, as to be clearly known and identified. Under the civil code of Louisiana, the exchanger who is evicted has a choice either to sue for damages, or for the thing he gave in exchange; but he must first be evicted, before his cause of action can accrue.

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ERROR to the Circuit Court for the Eastern District of Louisiana. In May 1838, in the circuit court of the United States for the ninth circuit and eastern district of Louisiana, Richard Raynal Keene filed his petition against Isaac T. Preston, as executor of James Brown, deceased, alleging, that by virtue of a notarial contract, made in New Orleans, on the 21st day of August 1807, the said James Brown, and his brother, Samuel Brown, also since deceased, became bound, for a valuable consideration, &c., to convey and deliver to the petitioner a lot of ground of specific dimensions, containing 7200 square feet, situated in or upon the New Orleans or Gravier batture.

The case was argued by *Crittenden* and *Clay*, for the plaintiff in error ; and by *Jones* and *Key*, for the defendant. The decision of the court having been made, principally, on the facts of the case, the arguments of the counsel are not stated.

The case was tried before the circuit court, upon the evidence and exhibits in the same ; and a decree was rendered for the complainant for \$35,500 ; or that the defendant, the executor of James Brown, should, on or before the 10th day of July then ensuing, convey to said plaintiff, with good *and legal title, a lot of ground of the value of \$31,500, containing [*134 sixty feet in front by one hundred and twenty feet in depth, situated on the Batture in front of the suburb St. Mary, in New Orleans, the same that was adjudged to John Gravier by the superior court of the late territory of Orleans, in the month of May 1807 ; then said judgment, exclusive of costs, shall be deemed satisfied. The defendant prosecuted this appeal.

The record from the circuit court of Louisiana brought up all the testimony exhibited in the cause before that court.

BARBOUR, Justice, delivered the opinion of the court.—This case comes before us, by appeal from a decree of the circuit court of the United States for the eastern district of Louisiana. It was a petition, according to the course of practice in that state, but which we consider as substantially a bill in equity, filed by the appellee, against the appellant, as executor of James Brown, deceased ; stating, that James and Samuel Brown had become bound, for a valuable consideration, by them received, to convey to him a lot in New Orleans, by a notarial contract, bearing date the 21st of August 1807 ; that he had in vain demanded of James Brown a fulfilment of his contract in relation to the lot ; that said James Brown having died, and constituted the appellant his executor, by his last will, the executor had duly qualified as such, and taken upon himself the burden of its execution. And praying, that said Brown's executor might be condemned and adjudged, to convey and deliver to him, with good and valid title, the said lot, or to pay to him the value thereof ; which he stated to be, at the time of filing his petition, \$37,500.

Brown's executor answered, setting forth the origin and character of his right to the lot in question ; that it was a lot in the Batture of New Orleans ; that a certain John Gravier had, by a judgment of the superior court of Orleans, recovered the Batture in front of the suburb of Saint Mary ; that he had sold two-thirds thereof to Peter Delabigarre, who sold one half of his interest to Edward Livingston ; that Delabigarre died, hav-

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ing, by his will, appointed certain trustees, with direction to make partition of said Batture ; that the trustees and Livingston did make partition thereof, on the 14th of August 1807, in which it was acknowledged, that a certain lot therein described, which is the one now in question, was to be conveyed to James Brown, who had been employed as counsel in prosecuting the claim of Gravier to the said property ; and the trustees agreed to convey to James Brown the said lot, out of their proportion of the Batture ; that it was in consideration of James Brown's right, such as before stated, in a lot on the Batture ; that Keene made the conveyance in the notarial act of the 21st of August 1807. He denies, that Brown ever conveyed, or agreed himself to convey, title to the lot, to the plaintiff, but only agreed to *135] substitute the plaintiff for himself, to receive such title as the representatives of Delabigarre and Livingston could make. He avers, that of the day after the notarial act aforesaid, to wit, the 22d of August 1807, Brown addressed a letter to the executors of Delabigarre, acknowledging that the plaintiff had become the owner of the lot due to him by Edward Livingston, and requesting them to execute to the plaintiff the necessary deeds to convey the property.

Livingston, it seems, was the one who had employed Brown in Gravier's suit, to prosecute the claim to the Batture ; and the lot in question was to be Brown's compensation for his services.

The answer, then, relies upon certain correspondence between Keene and Brown, in relation to this lot, as explaining the understanding of the parties, as to the nature of the contract between them concerning it. The answer avers, that Keene was one of the counsel for the corporation of New Orleans, in Gravier's suit against them for the Batture ; that he was perfectly acquainted with Brown's right to the lot ; and that it was the right of Brown, thus known to him, and not a title from and warranted by Brown, which was the consideration of the deed, or notarial act of sale, of the 21st of August 1807, which is that on which Keene founded his right of recovery. The answer finally relies on the prescription of one, five, ten, twenty and thirty years. The circuit court decreed in favor of Keene, \$31,500, with costs ; and that if Brown's executor, should, by a given day, convey to Keene a lot of that value, containing sixty feet in front, by one hundred and twenty feet in depth, situated on a part of the Batture particularly described, then that the judgment, exclusive of costs, should be satisfied. From that decree, this appeal is taken.

The following is the notarial contract, or act of sale annexed to Keene's petition, and on which his claim is founded.

"Know all men, by these presents, that I, Richard Raynal Keene, of the city of New Orleans, for and in consideration of a certain lot or parcel of land, consisting of sixty feet front and one hundred and twenty feet deep, situated on the Batture, lately decreed and adjudged to John Gravier by the superior court holden in said city, have conveyed and transferred, and by these presents do convey and transfer, unto James Brown and Samuel Brown, of said city, all my right, title and interest in and to a certain tract or parcel of land, consisting of five acres front and forty acres deep, and situated at the English turn, on the left bank of the Mississippi, be the same more or less ; which said tract of land, I, the said Keene, purchased, in the year 1805, of Helene Modeste Barbinnée Guinault ; hereby warranting and

defending unto the said James, and the said Samuel, all my right and title as aforesaid, and unto all persons claiming under them."

The first question which arises, and that, indeed, which lies at the very foundation of the case, is, what is the true interpretation of this act of sale, or notarial contract?

On the part of the appellee, it is contended, that it is an exchange; [*136 *that by the civil code of Louisiana, in every contract of exchange, each party is individually considered in the double light of vendor and vendee; that Brown being considered as vendor of the lot stated in the act of sale, and the lot being the consideration for Keene's conveyance, it follows, that he incurred the two obligations which the civil code imposes on all vendors, to wit, that of delivering, and that of warranting, the thing which he sells; that Brown has failed in the fulfilment of both of these obligations, and consequently, was liable to the decree which has been made as the just equivalent for their non-fulfilment. Assuming the contract in question to be an exchange, there is no doubt, but that the obligations attached to it, and the consequences which flow from it, are accurately stated in this summary of the appellee's argument.

But let us examine whether the contract in question is of the class to which this course of reasoning assumes that it belongs. In article 2630 of the civil code, an exchange is defined to be "a contract by which the contractors give to one another one thing for another, whatever it be, except money; for in that case it would be a sale." This definition proves, as the term exchange, *ex vi termini*, imports, that it is what is denominated in the civil code, a reciprocal contract; which, by article 1758 of that code, is declared to be a contract, where the parties expressly enter into mutual engagements. The question then, is, does the act of sale now under consideration contain mutual engagements?

It commences in the first person, "I, Richard Raynal Keene." It is he, and he only, who speaks throughout the whole instrument, from its commencement to its termination; James and Samuel Brown are mentioned as grantees only; but they do not profess to grant to Keene—no part of the language being theirs; the *in testimonium* clause is also in the first person, thus: "In testimony whereof, I hereto subscribe my name, this 21st of August 1807;" that is, I, Richard Raynal Keene. The engagement, then, contained in this instrument, is that of the person speaking in it, whose language constitutes the very instrument itself. But there is no mutual engagement on the part of the Messrs. Browns, because they do not speak; and therefore, the language of the grantor, professing to convey property, cannot have the effect of converting the grantee himself into a grantor, by the very terms which describe and treat him as grantee only. It seemed to be supposed, that the construction of the act of sale ought to be affected by the circumstance, that the Messrs. Brown also signed it. No such effect can be produced, because the difficulty still remains, that it is Richard Raynal Keene, and he only, who speaks in the instrument; their signature therefore, cannot cause the language of him who alone speaks in the instrument, to be ascribed to those who do not. Moreover, they signed it for no such purpose; they did it only, as we feel ourselves authorized to suppose, in accordance with the usage, where instruments are executed before a notary, as this was, *and for the purpose of indicating their wil- [*137

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lingness to accept the grant. That such is the purpose for which grantees sign acts of sale, executed before a notary, is proved by the record in this case; for we find, that one in which Davis grants land to Jones is signed by Jones also; and states upon its face, that the grantee was present, and accepted the grant. The truth is, that the lot of land, now in question is not otherwise mentioned in the act of sale than as mere matter of recital by Keene, the grantor, as the consideration which moved him to make the grant. It is, therefore, undeniably true, that he alone speaks in the instrument, as well in regard to the land conveyed by him, as in relation to that which induced him to make the conveyance.

But there are other difficulties in the way of the appellee's construction. An exchange is an executed contract; it operates, *per se*, as a reciprocal conveyance of the thing given, and of the thing received in exchange. Now, so far from this ground being taken in Keene's petition, it will be seen, that his allegation is, that the Messrs. Brown, for a valuable consideration, received, became bound, by the act of sale of the 21st of August 1807, to convey and deliver to him a lot of ground, as described in his petition; whereas, the argument at the bar assumes, that the act of sale was itself the conveyance.

Again, the lot in question is only described as to the extent of its front and depth, its situation on the Batture, and the fact of its having been recently adjudged to Gravier by the superior court of Orleans; but it is not at all described by metes and bounds; and there were many lots on the Batture to which the general description would equally apply. Now, it enters into the very idea of an exchange, that the thing given or taken in exchange shall be specific, and so distinguishable from other things of the like kind as to be clearly known and identified. The necessity of the identification of the subject-matter of an exchange will be rendered apparent by this consideration; that by article 2633 of the civil code, the exchanger, who is evicted by a judgment, of the thing he has received in exchange, has his choice either to sue for damages, or for the thing he gave in exchange. But he must first be evicted, before his cause of action can accrue. Now, it is obvious to remark, that this eviction cannot occur in a case where the thing supposed to have been received in exchange is not specific; is not designated so as to be distinguishable from many other of the like kind; and where, therefore, there could not be a violation of either of the two obligations imposed by the civil code on all vendors: 1st, that of delivering; and 2d, that of warranting the thing sold: not of the first, because, until it was designated, it could not be delivered; not of the second, because, not having been delivered, there could not be an eviction.

We think, then, that the act of sale in this case was, in no just sense, an exchange; nay, that it in itself imported no contract whatever
 *138] on the part of the Messrs. Brown to convey the lot in question to Keene.

If, indeed, it could be considered as amounting to a contract of any kind, it certainly could be nothing more than an executory one; and then, from the uncertainty and ambiguity upon its face, arising as well from the want of description of the lot, as from the reference to the recent adjudication of the title in favor of Gravier, it would be necessary to look beyond the act of sale, to extrinsic evidence, for the purpose of removing such uncer-

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tainty and ambiguity. But as we have already said, we are of opinion, that there is nothing on the face of the act of sale which amounts to any contract whatsoever, on the part of the Messrs. Brown, either executed or executory. Whatever claim, then, Keene may have, must rest for its support upon some other evidence in the record; and in this view, we proceed to examine the correspondence between Keene and James Brown, which took place in May 1824.

On the 13th of May, of that year, Brown wrote to Keene, in answer to a note from Keene to Brown, which is not in the record, making inquiries in regard to the lot in question, as follows: "Col. Keene will find the contract between himself and Mr. Brown in the office of Pedesciaux, at New Orleans. It was drawn up, I think, by Lozano, who, I believe, yet resides there." Without exclaiming in detail several other letters from Keene to Brown, we pass at once to the examination of Brown's letter of May 15th, 1824, and of Keene's answer of the 17th of the same month, which will show the understanding of both the parties in relation to the subject. Brown, in his letter, writes as follows:

"Paris, May 15, 1824.

"Dear sir:—I am sorry I am unable to add anything to the statement I sent you on the subject of the lot promised me by Mr. Livingston in New Orleans. The state of your memory will account for the imperfection of mine, which I trust is not a matter of so much importance, when I feel fully persuaded, that the whole was reduced to writing. When last in New Orleans, Col. Davis applied to me on the same subject, and I told him, that, as I had, by a note to Mr. Livingston, substituted you for myself, as to any compensation for my argument in that cause, I had never said anything as to my claim, but had left Mr. Keene to arrange it with Mr. Livingston. You knew the whole transaction, just as well as I did, being in the habit of daily intercourse with Mr. Livingston and myself. Col. Davis told me, he had bought the lot from you, but I did not ask him any questions respecting it. The size, situation and boundaries were never described; and I would not have made any disposition of it, had I not understood you as having conversed with Mr. Livingston, and as consenting to take it. I feel fully persuaded, that on arriving at New Orleans, you will find our contract reduced to writing. May you not have passed the order I gave you, to substitute you for my *expectations from Mr. Livingston, to Col. Davis, and have forgotten it? Be assured of my dispositions that [*139 you should obtain all I promised; and the best evidence of that disposition is afforded by the fact, that I have never claimed anything from Mr. Livingston. I passed merely all my interest, without any ultimate responsibility under the promise he made me to you, and left you to arrange it between you. I think the transaction must have taken place one or two years before you left the country. I am, sir, very respectfully, Your most obed't ser't,

"COL. KEENE.
JAMES BROWN."

In answer to this letter, Keene, on the 17th of May, writes to Mr. Brown as follows: "I certainly have no hesitation in acknowledging that your responsibility about the batture lot does not extend beyond your substituting me for yourself, in respect to the conveyance to be made by Mr. Livingston, in the sense explained by you."

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From the correspondence which is here stated (and there are other parts of Keene's letters, corroborating that just stated from his letter of the 17th of May), we are satisfied, that the contract between him and Brown was, that Brown agreed to substitute Keene in his place, and to all his right to the lot in question, and that Keene was to receive from or through Mr. Livingston a conveyance therefor; that it was not the agreement or understanding of the parties, that Brown was to lie under any responsibility whatever as to the title; that Keene had knowledge of the origin and nature of Brown's interest, of the condition of the property, and the title to it; and that he agreed to take that interest, such as it was, and to receive a conveyance, not from Brown, but from the executors of Delabigarre, in whom the legal title was.

Thus understanding the agreement between the parties, we think that Brown acquitted himself of all obligation which it imposed upon him, when, on the 22d of August 1807, the very day after the act of sale from Keene, Brown wrote to the executors of Delabigarre, the note in the record, requesting them to execute to Keene the necessary deeds to convey to him the lot in question. It was competent to Keene to have called upon Delabigarre's executors for a conveyance of the lot, and in the event of failure or refusal, to enforce it by judicial proceedings. If he has, by neglecting to do so, suffered loss, he must abide the consequences of his own negligence; and has no claim whatever, in law or equity, to throw the loss on Brown or his representatives.

The views which we have thus presented being decisive of the case, it is unnecessary to examine the other questions, which were so fully discussed at the bar. The decree is reversed, and cause remanded, with directions to dismiss the petition.

*140] *THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the judgment and decree of the said circuit court be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said circuit court, with directions to dismiss the petition.

*141] *THE BANK OF ALEXANDRIA, Plaintiff in error, v. EDWARD and FRANCIS DYER, Defendants in error.

Statute of limitations.—Beyond seas.—District of Columbia.

An action was instituted by the Bank of Alexandria, in the county of Alexandria, against the defendants, residents in the county of Washington, in the same district, for money loaned; the suit was brought in the county of Washington. The defendants pleaded the statute of limitations of Maryland, which prevails in that part of the district of Columbia, and which limits such actions to three years, from the date of the contract; the plaintiff replied, that he was "beyond seas;" claiming the benefit of the exception in the statute in favor of persons "beyond seas."

The words "beyond seas," in the statute of limitations of Maryland, are manifestly borrowed from the English statute of limitations of James I., c. 21; and it has always been held, that they ought not to be interpreted according to their literal meaning; but ought to be construed as equivalent to the words "without the jurisdiction of the state." According to this

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interpretation, a person residing in another state of the Union was "beyond seas," within the meaning of the act of assembly; and therefore, excepted from its operation, until he should come within the limits of Maryland. This statute is in force in Washington county, in the district of Columbia, and this court will give it the same construction it has received in the courts of Maryland.

The county of Alexandria, in the district of Columbia, cannot be regarded as standing in the same relation to the county of Washington that the states of this Union stand in relation to one another.

The counties of Washington and Alexandria together constitute the territory of Columbia, and are united under one territorial government; they have been formed by the acts of congress into one separate political community; and the counties which constitute it resemble different counties in the same state; and do not stand towards one another in the relations of distinct and separate governments. Residents of the county of Alexandria were not "beyond seas," in respect to the county of Washington.¹

Bank of Alexandria v. Dyer, 5 Cr. C. C. 403, affirmed.

ERROR to the Circuit Court of the District of Columbia, and county of Washington. On the 26th of October 1835, the plaintiff in error instituted a suit in the circuit court of the United States for the county of Washington, in the district of Columbia, against the defendants, for the sum of \$2500, by them, the plaintiffs, before that time, in Alexandria, in the district of Columbia, lent and advanced to the defendants, at their special instance and request. The defendants pleaded the statute of limitations of the state of Maryland, which limits actions of this nature to three years. To this plea, the plaintiff replied, that at the time of making of the promise alleged against the defendants, they, the said plaintiffs, were in the county of Alexandria, in the district of Columbia, beyond the seas; and so continued until the day of the impetration of the original writ in this action. The defendants demurred to this replication, and the circuit court gave judgment for the defendants. The plaintiffs prosecuted this writ of error.

*The case was argued by *Coxe*, for the plaintiffs in error; and by *Brent and Jones*, for the defendants. [*142]

Coxe said, the defendants rely on the statute of limitations of Maryland, which restrains actions of the description of that before the court to three years. The plaintiffs pleaded, that they were in the state of Virginia, and beyond "seas;" and therefore, not within the provisions of the statute of Maryland.

The laws of Maryland prevail on this side of the river Potomac, and govern in all cases arising within that part of the district of Columbia which was ceded by the state of Maryland to the United States. The second section of the act of the assembly of Maryland, passed in 1815, limits actions on simple contract to three years. This limitation is to actions within the province, now state, of Maryland. The plaintiff never was in the state of Maryland, nor in the county of Washington. Those "beyond seas" are excepted from the operation of the statute; and the question is, whether the plaintiffs are within the statute. In Alexandria, on the south side of the Potomac, another limitation law prevails. The limitation by that law is five years. 1 Rev. Co. of Va. 488. The act of congress of 27th February 1801, declares, that the laws of the state to which the ceded territory had belonged, shall be the laws in the part of the district ceded by the state.

¹ Suckley v. Slade, 5 Cr. C. C. 617; Davis v. Briggs, 97 U. S. 637.

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The terms "beyond seas," mean beyond the limits of the state of Maryland, and out of the jurisdiction of the courts of the state; until 1801, therefore, the replication of the defendant would have been sufficient. The single question in the case is, then, whether the counties in the district of Columbia, on both sides of the Potomac river, having been ceded to the United States, the county of Washington is now, as to the part of the district ceded by Virginia, "beyond seas." The parts of the district separated by the river have been treated, as to the importation of slaves from the county of Alexandria into the county of Washington, as altogether foreign to each other. This has been remedied by special enactments; but such enactments were necessary to change these relations. Act of Maryland 1802; Act of Congress 1812. In other particulars, the two counties have been held to be distinct. As to the acknowledgment of deeds, a deed acknowledged according to the provisions of the law of Maryland, cannot be admitted of record in the county of Alexandria; and the same rule applies to deeds acknowledged under the Virginia laws, intended to convey lands in the county of Washington. There has been a uniform recognition of the principle, that those parts of the district continued to be distinct communities, by Virginia, Maryland and the United States.

It is now contended, they are the same community, because they are under the same government. This is not altogether true. Maryland *143] *was not a party to the cession by Virginia, nor was Virginia to the cession by Maryland. If the position be maintained, that because the states of the Union have the same government, they are the same community, the exceptions in the statutes of limitations of one state cannot be pleaded to actions brought against citizens of the United States. Circuit courts of the United States are held by judges of the supreme court in all the states. The states are thus to each other, what the county of Washington is to the county of Alexandria. An attempt will be made to show, that under the statute of James, "beyond seas" did not apply to Scotland. That the county of Washington stands in the same relation to the county of Alexandria, that Scotland did to England. But the statute of Henry VII. made the exception in favor of persons "beyond the realm," and this was altered by the statute of James, to "beyond seas." This was considered as fixing the interpretation in favor of Scotland, so as to prevent the exception being applied. Ireland has always been held to be "beyond seas," under the exception in the English statute of limitations.

It is denied, that the adoption of the legislation of the states, of which the district of Columbia is a part, is to be considered as the legislation of congress. The laws existing before cession, continued after the cession was made. The people of the ceded territory continued to enjoy the same laws which prevailed before. This principle has been settled by the laws of nations, and by the decisions of this court.

But if there is any inconvenience in the application of the principles contended for by the plaintiff in error, congress may afford a remedy. Congress has interposed in other cases. Real property has been made equally liable to debts, in all parts of the district. So the powers of the orphans' court have been made the same throughout the counties of Alexandria and Wash-

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ington. As to the legislation of congress relative to slaves : cited, *Lee v. Lee*, 8 Pet. 49.

Jones and *Brent* considered the laws prevailing in the district, as flowing from the same fountain. The sovereignty is the same ; and the law stands as if congress had enacted that the limitation of actions of this kind should be three years in the county of Washington, and five years in the county of Alexandria. Thus considered, there is no ground for the exception. The whole district is one political body.

How has the question as to the operation of the statutes of limitations been settled ? It has been held, that the limitation of actions is a part of the *lex fori*, and does not affect the contract. They leave it to be enforced elsewhere, according to the laws of the place ; and only prevent the remedy, when the party who claims the application of the law is within its provisions. He who claims the advantage of an exception must bring himself strictly within it. **Angel on Limitations* 218 ; *King v. Walker*, [*144 1 W. Bl. 286. The courts of the United States have decided, that the states of the Union are, to a certain extent, foreign to each other. They are so, because of their being separate and distinct governments ; and it has, therefore, been properly held, that the exception in the statutes of limitations, in favor of persons "beyond seas," may be well applied to citizens of different states. But the counties of the district of Columbia are under one government ; are one community ; and as in the case of Scotland, under the statute of James, the exception has no application. *Murray's Lessee v. Baker*, 3 Wheat. 541 ; *Shelby v. Gay*, 11 Ibid. 361 ; 1 Johns. Cas. 8 ; 2 McCord 231 ; 1 Har. & Johns. 352.

CATRON, Justice, inquired, if the Bank of Alexandria was not incorporated by congress. This would make it a corporation of the district. Mr. Brent said, it was so incorporated.

The inconveniences attending the construction of the statute of limitations, contended for by the counsel for the plaintiff in error, would be very great ; and the court would consider arguments *ab inconvenienti* in such a case, as of great force. If, by a broad construction of the statute, they can avoid the inconvenience, they will do so.

As to the general question, it is contended, that the act of congress authorizing the exclusive legislation of congress over the district of Columbia, looked to the establishment of a single government. This was the object and purpose of the United States, as are shown by acts of congress, and the acts of cession. The question of the identity of the whole district was discussed in the case of *Hepburn v. Ellzey*, 2 Cranch 445. It was there decided, that the district was a state, but not a state of the Union, within the constitution and the laws of congress. It was held to be a general body politic ; but only not constitutionally a state. The case of Scotland is a strong illustration of the principle contended for by the defendants. Scotland was a separate kingdom ; but it was not held to be beyond sea, as to England.

The court are asked to give a sensible and practical interpretation of the act of limitations. They have done this in relation to limitation laws of states, and the same should be done in this case ; all that is required is,

that the person who claims the benefit of the exception shall have been out of the state. Is a strained construction of the statute, to affect the obvious interpretation of it?

There has been legislation by congress on one point which presents a strong illustration of the principle claimed by the defendants. The act establishing a circuit court in the district of Columbia, gives jurisdiction in cases between citizens of the district. This was held to limit the jurisdiction to persons found within, or resident in, the district; to be personally resident within one of the counties of the district. This shows, that by *145] adopting a different *code for each side of the Potomac, they did not intend to make the courts separate. Always, when congress intends to provide for anything like original legislation, they make the provisions of the laws applicable to the district generally; they provide for jurisdiction of the circuit court over the whole district.

TANEY, Ch. J., delivered the opinion of the court.—This case arises upon an action of *assumpsit*, brought by the plaintiffs in error, against the defendants, in the circuit court of the United States, for Washington county, in the district of Columbia. The declaration contains the usual money counts, to which the defendants pleaded the statute of limitations. The plaintiffs replied, that they ought not to be precluded from having their action, because at the time of making the promise, they (the plaintiffs) “were in the county of Alexandria, in the district of Columbia, beyond the seas;” and so in the county of Alexandria, beyond the seas, remained, until the bringing of this action. To this replication, the defendants demurred. The plaintiffs joined in demurrer; and the circuit court gave judgment for the defendants.

The question presented by these pleadings, is the construction of that clause in the Maryland act of limitations, which exempts from the operation of the act all persons who are “beyond the seas,” at the time cause of action accrues, and continues the exemption until they shall return. The words, “beyond the seas,” in this law, are manifestly borrowed from the English statute of limitation of James I., c. 21; and it has always been held, that they ought not to be interpreted according to their literal meaning, but ought to be construed as equivalent to the words, “without the jurisdiction of the state.” According to this interpretation, a person residing in any other state of the Union, was “beyond the seas,” within the meaning of this act of assembly; and therefore, excepted from its operation until he should come within the limits of Maryland.

This statute is in force in Washington county, in this district, where the present action was brought; having been adopted for that county by the act of congress of February 27th, 1801, together with the other laws of Maryland, as they then existed. And having been thus adopted, the court will, of course, give to it the construction which it has uniformly received in the courts of Maryland. But the county of Alexandria, in this district, cannot be regarded as standing in the same relation to the county of Washington, that the states of this Union stand in relation to one another. When this act of limitation was passed (1715, ch. 23), no doubt a person in Alexandria was “beyond the seas,” in relation to Maryland, in the sense in which these words are used in the law in question. But it is equally certain, that if

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the county of Alexandria, had afterwards been ceded to Maryland, and been incorporated with it, as a part of the same political body, the inhabitants of that county *would no longer have been within the saving of this [*146 proviso; and the act of limitations would have operated directly upon them. The same principles must apply, when the county of Alexandria has become united with a portion of Maryland, in which this act of limitation is in force, and forms with such portion one political community, united under one government. Such is now the condition of the counties of Washington and Alexandria, which together constitute the territory of Columbia, and are united under one territorial government. They have been formed by the acts of congress into one separate political community; and the two counties which compose it resemble different counties in the same state, and do not stand towards one another in the relation of distinct and separate governments. The plaintiffs, therefore, were not "beyond the seas," in respect to the county of Washington; and the judgment of the circuit court must be affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*The Lessee of AMBROSE WALDEN, Plaintiff in error, v. JOHN [*147 CRAIG's Heirs, and others, Defendants in error.

Scire facias to revive judgment in ejectment.—Enlargement of term by amendment.—Demurrer.—Parties.

In a *scire facias* to revive a judgment in ejectment, where it is stated, that the term recovered is yet unexpired, this is sufficient; it is not required, that the term as laid in the declaration, and that facts showing its continuance, should be stated.

When the court have given leave, on motion, to extend the term in a demise, and the amendment is specific, it is not necessary to interline it in the declaration; if leave to amend the declaration had been given generally, and the amendments had not been interlined, it would be different.

In Kentucky, there is no law which limits a revival of judgments; and at law, lapse of time can only operate by way of evidence. From lapse of time, and favorable circumstances, the existence of a deed may be presumed, or that an obligation has been discharged; but this presumption always arises under pleadings, which would render the facts presumed proper evidence. A demurrer to a *scire facias* raises only questions of law, on the facts stated in the writ of *scire facias*; no evidence is heard by the court, on the demurrer; and consequently, there is no presumption against the judgment on which the writ issued, from lapse of time.

The marshal, on his return to a *scire facias* to revive a judgment in ejectment, stated, that two of the defendants were dead. This return does not become matter of record, like the fact of service of the writ, stated in the return; and cannot be taken advantage of by demurrer. A plea in abatement is the proper method of taking advantage of the decease of those of the defendants who are deceased; on this plea, the plaintiff can take issue, and have the facts ascertained by a jury.

To a *scire facias* to revive a judgment in ejectment, it is not necessary to make the executors or administrators of deceased defendants parties; the subject-matter in dispute being land, over which they have no control. The law is well settled, that where a defendant in ejectment dies, the judgment must be revived against both his heirs and the terre-tenants.

Service of process or notice is necessary to enable a court to exercise jurisdiction in a case; and

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if jurisdiction be taken in a case in which there has been no process or notice, the proceeding is a nullity ; but this is only where original jurisdiction is exercised, and not a decision of a collateral question, in a case where the parties are before the court.

After judgment, the parties are still in court, for all the purposes of giving effect to it ; and in the action of ejectment, the court having power to extend the demise, after judgment, the defendant may be considered in court, on a motion to amend, as well as on any other motion or order which may be necessary to carry into effect the judgment. In no correct sense, is this power of amendment similar to the exercise of an original jurisdiction between parties on whom process has not been served.

ERROR to the Circuit Court of Kentucky.

This case was argued by *Underwood*, for the plaintiff in error ; and by *Crittenden*, for the defendant.

As stated in the brief and argument for the defendant, the case was : "This is a *scire facias* to revive a judgment in ejectment of the district court of the United States for the Kentucky district, which Walden's lessee had recovered against Lewis Craig and Abraham Shockey, on the 19th day of June 1800. The *scire facias* bears date the 27th of March 1837 ; and Lewis Craig having previously died, it was sued against his heirs and Abraham Shockey, and also against Thomas Blair, as tenant in possession. The defendants demurred to the *scire facias*, and also pleaded *nul tiel record*, on *148] both *which, issues were joined ; and on both, the court (having heard the evidence on the latter issue) being of opinion in favor of the defendants, gave judgment for them. The plaintiff excepted to the decision of the court against him, on the issue of *nul tiel record* ; and by his bill of exceptions, spread upon the record the evidence by which, on his part, he attempted to sustain that issue. This evidence consisted, 1st, of the record of proceedings in the original action of ejectment by Walden's lessee v. Craig, &c., and the judgment therein in favor of the plaintiff, rendered on the 19th of June 1800, 'for his term, &c., yet to come and unexpired, together with his costs,' &c. The demise in the declaration on which this judgment was rendered was for a term of ten years, from the 15th of August 1789. And 2d, the record of an entry made in the same case, on the 8th of May 1824, in these words, to wit : 'On motion of the plaintiff in the above cause, by his attorney, leave is given to amend the declaration, by extending the demise to fifty years ; which is done accordingly ; but execution not to go out before the 1st day of March next.' This, it is presumed, is all the evidence that can be judicially regarded as belonging to this case, or made part of it by the bill of exceptions, though it further appears, from what has been incorporated in the record, that, on the 2d June 1812, an execution of *habere facias* issued on the judgment in ejectment, and that afterwards, at the July term 1813, it was quashed, because it had been issued 'after the expiration of the demise in the declaration.' And it also appears, that, in the year 1835, Thomas Blair, the tenant in possession, made application to the court to annul and set aside the order of May 1824, for extending the demise ; and that this application was overruled by a division of the judges."

Crittenden, for the defendant in error.—If the decision of the court was correct, either upon the demurrer to the *scire facias*, or upon the plea of *nul tiel record*, the judgment for the defendants was right. And they contended, that the court decided correctly on both the points.

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1. As to the demurrer. The law of Kentucky having dispensed with the necessity of a declaration upon a writ of *scire facias*, it has been adjudged, in many cases, that the *scire facias* must answer the end of a declaration, and must set out all such facts as will warrant a judgment upon it. *Dozier v. Gore*, 1 Litt. 164 ; 5 Ibid. 59 ; *Holland v. Boulden*, 4 T. B. Monr. 148. And in the case of *Wood v. Coghill*, 7 Ibid. 601, it was decided by the court of appeals of Kentucky, that a *scire facias*, to revive a judgment in ejectment, must state the term yet to come, as laid in the declaration ; for that, if the term has expired, there can be no writ of possession on the judgment. We insist, therefore, that the *scire facias* in this case, not stating *the [*149 term as laid in the declaration in ejectment, nor any facts that showed its continuance, is fatally defective. And if we are permitted, upon the demurrer, to look beyond the *scire facias*, and to aid its want of averments, by reference to the record of the judgment that it seeks to revive, and with which it is "intimately connected" (as is intimated in the case of *Thompson v. Dougherty's Heirs*, 3 J. J. Marsh. 564), then it will appear, that, in point of fact, the term for which that judgment was rendered had long before expired. For this defect, therefore, equally apparent on the face of the *scire facias* and of the judgment, the demurrer was correctly sustained.

We furthermore submit to the court, whether the lapse of time, being more than thirty-six years from the date of the original judgment to that of the *scire facias*, does not warrant that decision. A less period of time would, by the laws of Kentucky, have sufficed not only to cancel Walden's right of entry, but all his right and title to the land in contest. And it would seem, therefore, by strong analogy, that he ought not to be permitted, by the revival of a judgment so ancient, to escape those wholesome laws that secure long-continued possessions ; and to assert, in this indirect mode, rights that could not be sustained in any other form of action.

2. As to the plea of *nul tiel record*. By the issue on that plea, the plaintiff was bound to produce the record of a judgment for a term then (in the year 1837) unexpired. The judgment which he offered in evidence was rendered the 19th June 1800, for a term of ten years, commencing the 15th August 1789. It is needless to say more, than that here there was, in the most material particular, a clear and obvious failure of proof on his part. And the only evidence by which it was attempted to supply this defect was the order of court made, on the motion of the plaintiff, upon the 8th of May 1824, giving him leave to amend his declaration by "extending the demise to fifty years ;" and which, as the same entry proceeds to state, "is done accordingly." This order cannot help the plaintiff, or have any effect, for two reasons : 1st. Because the amendment it gave leave to make was not in fact made, as the record shows ; and the entry made in 1824, that it "is done accordingly," cannot be regarded, as it is apparent that amendment or extension of the demise was never made. 1 T. B. Monr. 113. 2d, The order itself is a nullity, made *ex parte*, on the plaintiff's motion, without notice to the defendants, or to any one interested to defend ; and that, after the parties to the judgment in ejectment had been out of court for more than twenty years.

By the settled law of Kentucky, and by the uniform adjudications of her courts, it is now established, that they have no power to permit or authorize any such extension of the demise, after judgment, without the assent of the

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opposite party. *Owings v. Marshall*, 2 Bibb 27. This court, however, in the case of *Walden v. Craig*, 9 Wheat. 576, determined, that the federal circuit court for Kentucky might grant leave, after judgment, to enlarge the term *150] stated in the *declaration ; and that, under the circumstances of that case, the motion for such leave ought to have been sustained. It is evident, from this decision, that it is not a matter of course, or of right, on the part of the plaintiff, to have such leave ; and that the exercise of the power or discretion of the court to grant it, depends on the circumstances of the case. Notice to the parties to be affected by such a proceeding, is just as necessary as it is in any other form of litigation ; and that no judgment or judicial proceeding can bind or affect any man who has had no warning, notice or opportunity of defence, is supposed to be a primary principle of justice of jurisprudence, that requires no illustration or authority for its support. The motion and leave to amend, in this case, being without notice, and wholly *ex parte*, are null and without effect. If amendments of this character are allowed, the whole object of the statute of limitations is defeated. If a party can lie by for such a length of time, and then restore himself to the same condition he was in when the suit was originated, by such an extension of the term, no statute can operate.

In England, some leave must be obtained by the party from the court, before a *scire facias* to revive a judgment can be sued out. It is a judicial writ. But this is not the law in Kentucky. Without an application to the court, the writ may be sued out ; but no one in Kentucky would, in the courts of that state, assert the validity and operation of the *scire facias* sued out in this case.

Underwood, for the plaintiff in error.—He contended, that the extension of the demise in this case was fully within the power of the court. Although it is considered that the defendants in the ejectment were constructively in court when the order was made, yet their presence is not necessary. The court exercise a discretion in the matter. They will not see the purposes of justice defeated, and they always interfere to prevent this.

The plaintiff had been prevented, by the introduction of bills in chancery, from obtaining any advantage from his judgment of recovery ; the controversy between him and the other parties began in 1789, and by delays which he could not control, but for the just indulgence of the court in extending the demise, all the benefits of his recovery in the ejectment would have been lost. Upwards of fifty years have passed ; and should this court affirm the judgment of the circuit court, the property to which the plaintiff has shown himself entitled to, at law and in equity, will be irretrievably lost to him.

The granting and the refusal of the extension of the demises in ejectment have been held by this court to be within the discretion of the court. The refusal of an extension has been decided by this court, not to be the subject of a writ of error. It was not then competent for the circuit court, at a later period in this case, to interfere with the action of the court in a matter exclusively in its jurisdiction and power.

*In *Walden v. Craig*, 9 Wheaton, this court decided, that the *151] demises in a declaration might be extended ; and held, that no writ of error would lie on this having been done in the circuit court. In this

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case, if notice of the motion to the court to extend the demise was necessary, it was given. The presumption always is, that the requisites to a proceeding by a court have been complied with.

A printed argument, by *Wickliff*, for the plaintiff in error, was handed to the court.

McLEAN, Justice, delivered the opinion of the court.—These cases are brought before this court, from the circuit court of Kentucky, by writs of error. (a) The plaintiff in error, who was the plaintiff in the circuit court, issued two writs of *scire facias*, to revive the judgments rendered in the above cases, the 19th of June 1800, against Shockey and Rose, the original defendants, and the heirs of Craig; *alias* writs were issued, and on the first and second writs, the marshal returned served on several of the heirs named; and that Shockey and Rose were deceased. In both cases, the defendants demurred to the writs of *scire facias*, and also pleaded *nul tiel record*. Issue being joined, the court gave judgments for the defendants on both issues; to revive which judgments these writs of error were prosecuted. A bill of exceptions spreads upon the record the evidence that was before the court on the issue of *nul tiel record*.

We will first consider the questions arising on the demurrer. It seems to be the practice in Kentucky, not to file a declaration on a writ of *scire facias*, but to consider the writ as the declaration. It is insisted, that these writs are all defective, in not stating the term as laid in the declarations, nor any facts which showed its continuance; and a decision in 7 T. B. Monr. 601, where it is stated that a *scire facias* to revive a judgment in ejectment must state the term yet to come, as laid in the declaration, is relied on. In the above writs, it is stated, that the term recovered is yet unexpired; and we think this allegation is sufficient. It would be an extremely technical rule, to require greater strictness than this. In 1 J. J. Marsh. 5, the court of appeals say, if a *scire facias* contain such recitals as will point to the judgment intended to be revived, with such certainty that the defendant must know what judgment was meant, it will be sufficient. And again, in 3 Ibid. 564, the court held, that where the *scire facias* contained an extract from the judgment, and referred to the record and proceedings in the suit, it was good. That execution is awarded on the original judgment, and the proceedings on that judgment being referred to in the writ, if the term had expired, the defendant might show it.

*The amendments made in 1824, which extended the demises fifty years, not being inserted in the declarations, it is insisted, that they [*152 cannot be considered as a part of the records referred to in the writs of *scire facias*. If leave had been generally given to amend, and no amendments of the declarations had been made, the objection would be insurmountable. But the amendments were specific, and they were entered on the records of the court; and they referred to the cases; so that no complete records of them could be made, without including these amendments. It was, therefore, unnecessary to interline them in the declarations. The

(a) Two cases were before the court, involving the same questions; this opinion was delivered in the two cases.

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writs, by statements of facts and by references, we think contain sufficient certainty.

But it is contended, that the demurrers should be sustained on the ground of lapse of time. The judgments sought to be revived were entered in 1800 ; but how is the lapse of time to operate ? It is not pretended, that there is any statute or rule in Kentucky, which limits a revival of the judgments ; and it is very clear, that at law, lapse of time can only operate by way of evidence. From lapse of time and favorable circumstances, the existence of a deed may be presumed, or that an obligation has been discharged ; but this presumption always arises under pleadings which would render the facts presumed proper evidence. A demurrer raises only questions of law, on the facts stated in the writs of *scire facias* themselves. No evidence is heard ; and consequently, there is no ground for presumption from lapse of time.

Can the demurrer be sustained on the ground of the marshal's return that Shockey and Rose, defendants in the judgments, are dead ? The marshal's return, it is said, becomes a matter of record, and therefore, advantage may be taken of this effect by the demurrer. It is admitted, that the marshal's return of service or non-service, which he indorses on the process, and of which he has official knowledge, becomes matter of record, and is binding on the parties. But the marshal can only know, in common with other citizens, of the decease of a person named in the writ ; and if he indorse the fact of such decease, though it may be spread on the record, it is clearly not binding on the parties. Shall a rumor, which shall, in the opinion of the marshal, justify such indorsement, make the fact a matter of record ? It may excuse the officer, but it does not bind the party whose rights are involved.

The demurrers treat the fact of the death of these defendants as matter of record ; and if it be matter of record, it cannot be controverted. In this view, then, if the rumor on which the marshal made the indorsement be false, the rights of the plaintiff are for ever concluded. He cannot revive his judgment against the heirs of living defendants ; and yet he cannot dispute the fact of their decease, as entered on the record. A plea in abatement was the proper mode of taking advantage *of the decease of
*153] these defendants. On this plea, the plaintiff could take issue on the fact of the decease, and have it ascertained by the verdict of a jury. Bac. Abr. Abatement, L. ; Chit. Plead. 442. If these defendants be dead, it would be error to revive the judgments, without the service of process on their representatives. But demurrers cannot be interposed which shall treat the fact of their decease as matter of record ; and which may prevent the plaintiff from issuing other writs in the cases. In every view which we can take of the questions properly arising on the demurrers, we think the circuit court erred in sustaining them.

As the subject-matter of dispute is land, over which the administrators or executors of the deceased defendants have no control, we do not perceive the necessity or propriety of making them parties in the writs. The law is well settled, that were a defendant in ejectment dies, the judgment must be revived by a *scire facias* against both his heirs and the terre-tenants. 2 Salk. 598, 600 ; 2 Saund. 7, n. 4 ; Cro. Jac. 506. And this is the rule of practice in Kentucky.

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We come now to consider the evidence offered and rejected by the circuit court, under the issue of *nul tiel record*. The records offered were rejected, on the ground, that the amendments made in 1824, extending the demise in each case to fifty years, having been made without notice to the defendants or the terre-tenants, were null and void. In both cases, the demise had expired, before the judgments were entered ; but the fact seems not to have been noticed by the counsel on either side. In 1800, and shortly after the rendition of the judgments, the defendants filed a bill, setting up an adverse, and as they alleged, a paramount equitable title to that of Walden for the land in controversy ; and obtained an injunction to stay proceedings on the judgments. This injunction was continued until May term 1809, when it was dismissed by the court for want of jurisdiction. In 1811, another bill was filed and an injunction obtained, which at May term 1812 was dissolved ; and in 1813, the bill was dismissed by the complainants, at rules, in the clerk's office. Writs of possession were issued the 2d June 1812, which, at July term 1813, were quashed, on the ground that the demises had expired. At July term 1817, a rule was entered for the defendants, Craig and Rose, to show cause, at the next term, why the demise in the declaration should not be extended. And at November term 1821, the court overruled the motion. To this decision, a bill of exceptions was taken, which stated that the above rule had been served on the defendants. A writ of error was taken out, and the decision of the court in the case is reported in 9 Wheat. 576. In their opinion, the court say, that the power of amendment is extended, at least, as far in *the 32d section [*154 of the judiciary act as in any of the British statutes ; and that there is no species of action to which the discretion of the court, in this respect, ought to be more liberally applied than to the action of ejectment. The proceedings are all fictitious, fabricated for the mere purposes of justice ; and there is every reason for allowing amendments in matters of mere form. "And," they say, "there is peculiar reason in this case, where the cause has been protracted, and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practised by the opposite party. The cases cited by the plaintiff's counsel in argument are, we think, full of authority for the amendment which was asked in the circuit court ; and we think the motion ought to have prevailed." But the court decided, that they could not take jurisdiction of the case, as a writ of error would not lie on the decision of a collateral motion in a cause. After this decision of the court was certified to the circuit court, the following entry was made on the record. "And afterwards, to wit, at the May term of the court aforesaid, in the year 1824, until which time the motion to extend the demise in the declaration was continued, etc., and leave is given on motion to amend the declaration by extending the demise to fifty years ; which is done accordingly."

In the other case against Craig and Shockey, there does not appear to have been a rule entered for the extension of the demise, or that notice was served of the mention. But the same entry was made of the continuance of the motion and the extension of the demise, as in the other case.

In one of the cases, then, there is evidence of notice having been given, but not in the other. And the question may be considered, whether there having been no notice, the amendment must be considered as void. If it be

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only erroneous and voidable, the circuit court erred in rejecting the record. The demises in the declarations having expired before the judgments, they could not authorize writs of *habere facias possessionem*; but they were not void; they were judgments on which executions might issue for the damages and costs. And the amendments having relation back to the expiration of the demises, gave vitality to both the judgments, the same as if the terms had originally been stated at fifty years.

It is admitted, that the service of process, or notice, is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken, where there has been no service of process, or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void. But this is only where original jurisdiction is exercised; and not a decision of a collateral question, in a case where the parties are before the court. If it were necessary, notices in the cases under consideration might well be presumed. For *155] it does not follow, that no notices were *given, because none appear upon the record. The fact of notice may be proved by parol. But however convenient in practice, and indeed, necessary to some extent, to preserve from prejudice the rights of parties, notice in such cases may be, still, it is a question of practice. It does not go, except under a positive rule, to the exercise of the power of amendment by the court.

After the judgment, the parties are still in court for all the purposes of giving effect to it. And in the action of ejectment, the court having power to extend the demise, after judgment, the defendant may be considered in court on this motion to amend, as well as on any other motion or order which may be necessary to carry into effect the judgment. In no correct sense is the exercise of this power of amendment similar to the exercise of an original jurisdiction, between parties on whom process has not been served. No new parties are made on the record, and no rights of the tenants are barred by the extension of this legal fiction; a fiction formed by the courts, and modified by them for the great purposes of justice.

The plaintiff's title was established by the judgment, and it would be most unreasonable and unjust, to deny him the fruits of these judgments, on the ground that the fictitious lease had expired, and which the court had power to amend. The judgments are described with sufficient accuracy; and there being no objection to the records, except the one above considered, we think the circuit court erred in excluding the judgments as evidence; and on this ground also, are the judgments of that court reversed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this case be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said circuit court, with directions to proceed therein, according to law and justice, and in conformity with the opinion of this court.

*AMBROSE WALDEN and others, Appellants, v. HENRY J. BODLEY and others, Appellees.

Amendments in chancery.—Res adjudicata.—Landlord and tenant.—Trustee and cestui que trust.—Prayer for general relief.

There are cases in chancery where amendments are permitted at any stage or progress of the cause, as, where an essential party has been omitted; but amendments which change the character of the bill or answer, so as to make, substantially, a new case, should rarely, if ever, be admitted, after the cause has been set for hearing, much less, after it has been heard.

A decree dismissing a bill in chancery, generally, may be set up in bar of a second bill; but where the bill has been dismissed, on the ground that the court had no jurisdiction, which shows that the merits were not heard, the dismissal is not a bar to a second bill.

Where parties, by agreement, dispense with the usual formalities, and no injustice results from the mode adopted, the court should not, on slight ground, set aside the proceeding.

It is a general rule, that a tenant shall not dispute his landlord's title; but this rule is subject to certain exceptions; if the tenant disclaims the tenure, and claims the fee in his own right, of which the landlord has notice, the relation of landlord and tenant is put an end to, and the tenant becomes a trespasser; and he is liable to be turned out of possession, though the period of his lease is not expired.

The same relation as that of landlord and tenant subsists between a trustee and a *cestui que trust*, as it regards the title.

A court of equity cannot act on a case which is not fairly made out by the bill and answer. But it is not necessary that these should point out, in detail, the means which the court shall adopt in giving relief; under the general prayer for relief, the court will often extend relief beyond the specific prayer, and not exactly in accordance with it; where a case for relief is made out in the bill, it may be given, by imposing conditions on the complainant, consistently with the rules of equity, in the discretion of the court.

APPEAL from the Circuit Court of Kentucky.

This case was submitted to the court, by *Underwood*, for the appellants; and by *Crittenden*, for the appellees, on the argument in the preceding case of *Walden v. Craig's Heirs et al.*

MCLEAN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court of Kentucky. Bodley and others filed their bill in the circuit court, representing, that on the 17th of October 1783, an entry was made in the name of Henry Crutcher and John Tibbs, for 10,000 acres of land, as follows: Henry Crutcher and John Tibbs enter 10,000 acres of land on a treasury-warrant, No. 18,747, as tenants in common, beginning at a large black ash and small buckeye, marked thus, J. T., on the side of a buffalo road, leading from the lower Blue Lick, a N. E. course, and about seven miles N. E. and by E. from the said Blue Licks, to a corner of an entry of twenty thousand acres, made in the name of John Tibbs, John Clark, John Sharp, David Blanchard and Alexander McLean, running thence with the said Tibbs & Co.'s line, due east, one thousand six hundred poles; thence south, one thousand poles; thence west, one thousand six hundred poles; thence north, one thousand poles, to the beginning, for quantity. *That in 1790, a legal survey having been executed, a [*157 patent was obtained in the names of Robert Rutherford, assignee of Henry Crutcher and Willoughby Tibbs, heir-at-law of John Tibbs, deceased in 1790. That by several mesne conveyances, the above tract was vested in the complainants.

The complainants represent, that Ambrose Walden, the defendant, on

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the 22d May 1780, entered 1333 $\frac{1}{4}$ acres of land on the east side of Jacob Johnson's settlement and pre-emption, on the waters of Johnson's Fork, a branch of Licking, to include two cabins on the north side of said Fork, built by Simon Butler; and to run eastwardly for quantity. This entry was surveyed the 29th November 1785, after which a patent was obtained. The bill charges that this entry and survey are void for want of certainty, &c. And that Lewis Craig purchased of Simon Kenton, who was the locator, and claimed one-third of the land entered for his services; which, being laid off, Craig sold several small tracts, by metes and bounds, to Jonathan Rose, William Allen and Charles Rector. That Rose sold a part of his purchase to Abraham Shockey; and Allen a part of his, to Amzey Chapin. And that Walden, alleging he had satisfied the claim of Kenton as locator, commenced two actions of ejectment in the district court of the United States for Kentucky, and obtained judgments against the purchasers under Craig. That Shockey and Chapin, knowing the title they held under Craig by purchase from Allen and Rose, was inferior to that of the complainants, became their tenants. That on the 30th October 1801, the complainants entered into an agreement with Lewis Craig, with the assent of Rose and Rector, for the land they had purchased, and deeds were made to them by the complainants. Shortly after this, Allen sold his land to Abraham Drake, to whom the complainants made a deed. That the complainants, Bodley and Pogue, purchased Shockey's claim to the land he had bought of Rose, and on which he had erected a valuable mill. And that they still held the legal title to that, and the land purchased by Chapin of Allen, and to a considerable part of the interference of their claim with Walden's. That twelve years after Walden obtained his judgments, he issued writs of *habere facias*, which were set aside, on the ground that the demises had expired. That in 1824, the demises were extended, without notice to the tenants, fifty years. That Rose, Rector and Allen, and those claiming under them, had possession of their respective tracts of land, by metes and bounds, as purchased from Craig, and held under the title of Bodley and Company, for more than thirty years, adversely to Walden. That Shockey and Chapin, and those holding under them, have had possession for near the same length of time, &c.

The complainants state, that Walden never has had possession of any part of his survey, except two hundred acres conveyed by him to Robert Pogue, by proper metes and bounds; about one hundred and fifty *158] acres of which was held by Carter; and that the complainants have made valuable and lasting improvements on the land, for which they require pay, if the title should be found in Walden. And they pray an injunction, &c.; which was granted.

The complainants afterwards amended their bill, by stating that Thomas Bodley and Robert Pogue, at the Fleming circuit court of Kentucky, in March 1825, in a suit in chancery against the unknown heirs of John Walden, deceased, and others, obtained a decree for the whole of Ambrose Walden's survey, except the one hundred and fifty acres owned by Carter; and except so much of John Walden's elder survey of 1666 $\frac{2}{3}$ acres, as was then in the possession of Ann Thraillhild, and the heirs of Jeremiah Proctor, deceased. And the complainants further state, that the tract of 1333 $\frac{1}{4}$ acres of Walden, interfered with an entry of 20,000 acres, made the 31st July

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1783, in the names of John Tibbs, John Clark, John Sharpe, David Blanchard and Alexander McLean, with the proper surveyor; 16,000 acres of which were surveyed and patented in the name of the complainant, Bodley; and this entry is charged to be paramount to that under which Walden claims.

Walden, in his answer, states, that he obtained judgments against the complainants, who are tenants on the land, by virtue of his legal and better title; and that he has been a long time delayed by the complainants from obtaining the possession of the land recovered. He admits, that some improvements have been made on the land; but alleges, that waste has been committed, and that rents and profits would more than compensate for the improvements. He states, that he brought his suits in ejectment, shortly after the adverse possession was taken; and he relies upon the dismissal of certain injunction bills, filed by the complainants, as a bar to the present suit. He knows nothing of the entries, surveys and patents, set forth in the bill, nor of the sales and conveyances stated; and he requires proof of the same. He insists on the validity of his own entry; and denies that Kenton, as locator, was entitled to any part of it, as he was paid in full for his services in locating the land. He denies all fraud; and prays the benefit of his judgments at law.

By agreement of the parties in the circuit court, "the record and proceedings of the Fleming circuit court were filed, and that cause was entered upon the docket, for further proceedings in this court. And that in the suits for trial, Thomas Bodley and others against Ambrose Walden, and Clark's heirs against Ambrose Walden, and also the one by Duncan's heirs against Walden, should be entered on the docket, and stand for hearing at the ensuing term, and be decided at the same time; they all being connected with the present controversy."

Bodley and Pogue having died, at November term 1833, by consent, the suit was revived in the names of their heirs and representatives; and a guardian *ad litem* was appointed to certain infant heirs. *A motion [159] is made by the defendants in the appeal, to dismiss it, on the ground, "that it is an appeal from several distinct decrees, in several separate suits, which are attempted to be united in this appeal; when there is no such record filed as is described in the appeal and citation thereon."

In the decree of the circuit court, it is stated, that by consent of the parties, the suits above named were to be heard at the same time; and the papers and pleadings filed in one case should be considered and have full effect in all the cases, to enable the court to decide the controversies in all the cases on their respective merits." And it was expressly agreed, "that the bill, answers and orders, the entries, surveys and patents, in the case of Bodley and Pogue, should be sufficient, without recording the whole suits and papers in each of the cases; and that in the event of either party appealing, the clerk may copy all the papers in all the records; and that when they are so copied and certified, the transcript shall have the same effect as if there were full and separate records made out in each and all of the cases: and this agreement was declared to be entered into, with the leave of the court, to avoid expenses in the cases, as they all involve the same questions." These agreements cover the apparent irregularities in the record, as it regards the decrees and the proceedings in the different

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cases stated ; and obviate the objections on which the motion to dismiss is founded.

A further motion is made, to dismiss the appeal as to all the parties named in the citation, who are not parties to the decrees. The names in the citation are found on the record, as parties to one or more of the several decrees entered. It is very clear, that the parties to the decrees only can be made responsible for the costs of this appeal. Before the decrees were pronounced in the circuit court, by consent of the parties, it was entered upon the record, that every agreement or admission on file, for the preparation of any one of the cases for hearing, shall extend to all of them. And it was admitted, that the complainants were respectively invested with the titles under the entries of Peter Johnson and Tibbs, and Clark and Tibbs, and Crutcher, as alleged in their several bills. And it was agreed, "that the court should give a final decree, without further ascertainment of the boundaries or positions of the particular tracts or settlements of each claimant or person interested ; and that the principles thereof shall be carried into effect as fully as if each tenement and each proprietor were specially named and identified."

The entries involved in this proceeding were brought before the court in the case of *Bodley v. Taylor*, 5 Cranch 191 ; and in their decision, in regard to Walden's entry as well as the others, the circuit court followed the decision of this court. It is true, the validity of these entries is brought before the court now by different parties ; and the former decision having been made between other parties, and on a state of facts somewhat different

*160] *from that now before us, does not settle, conclusively, the question in this case. But in looking into the evidence, it is found that the controlling call of Walden's entry is proved by Kenton and others ; and that the effect of this evidence is not shaken by the testimony on the other side. The calls of the entries are specific and notorious. Indeed, there seems to be little or no contest between the parties on this ground ; nor as to the survey of Walden's entry, as directed by the circuit court.

This entry being older and paramount to the other conflicting entries, it was held to be good ; but as the subsequent entries were made before Walden's entry was surveyed, it was, very properly, directed to be surveyed strictly in conformity to its calls. This mode of survey reduced the claim of Walden several hundred acres below the calls of his original survey. And for the land lying outside of this last survey, and within the original one, the circuit court decreed, that he should relinquish the possession, and release to the complainants, respectively, by metes and bounds stated, the tracts covered by their titles. Commissioners were appointed to ascertain the value of the improvements made by the tenants on the lands recovered by Walden ; the value of the rents and profits ; the value of the land without the improvements ; and whether waste had been committed, &c. A report was made by the commissioners, which, on motion of the complainants, was set aside, and another order to the commissioners was made. And afterwards, no steps having been taken by the complainants to execute the order, the injunction was dissolved, without prejudice to the complainants, for any claims they might have for improvements ; but the court refused to decree releases from the tenants to Walden, of their claim ; and also to

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order a writ to the marshal, directing him to put Walden in possession of the land recovered.

The circuit court, it appears, after the final decree was entered, set it aside, at the same term, and entered decrees in each of the cases. After the original decree was set aside, and before separate decrees were entered, the defendant moved the court for leave to file several answers to the cases placed on the docket by agreement, and also a cross-bill; which the court refused. And we think that this application to change the pleadings, after the hearing, and under the circumstances of this case, was very properly rejected. There are cases where amendments are permitted at any stage of the progress of the case; as, where an essential party has been omitted; but amendments which change the character of the bill or answer, so as to make substantially a new case, should rarely, if ever, be admitted, after the cause has been set for hearing, much less, after it has been heard.

On the part of the appellant, it is contended, that the first and second injunction bills which were filed in this case, before the present one, and which were dismissed, constitute a bar to the relief sought by the present bill.

*The controversy in this case, by various causes, has been protracted more than forty years. The judgments in the ejectment cases [*161 cases were obtained in 1800. In the same year, and shortly after the judgments were rendered, Bodley, Hughes and others obtained an injunction. This bill was dismissed by the court, in 1809, for want of jurisdiction. In 1811, another bill was filed, on which an injunction was allowed; and which, at May term 1812, was dissolved. The bill was afterwards dismissed, by the complainants, at rules, in the clerk's office. On the dissolution of this injunction, writs of *habere facias possessionem* were issued for the first time; and these, after being stayed by order of the judge, were quashed, at July term 1813, on the ground that the demises had expired. The demises were laid, commencing in 1789, for ten years; so that they had expired before the judgments were obtained.

In 1817, a motion was made to extend the demises, which was overruled. But the question was brought before this court, which decided, they had no jurisdiction of the case, but gave an opinion favorable to the amendment; which induced the circuit court, in 1824, to extend the demises to fifty years. In the year 1825, the present bill was filed, on which an injunction was issued to stay proceedings on the judgments, which was continued until the final decree of the circuit court.

As the first bill was dismissed for want of jurisdiction, and the second by the complainants, at rules, in the clerk's office, it is clear, that neither can operate as a bar to the present bill. A decree dismissing a bill, generally, may be set up in bar of a second bill, having the same object in view; but the court dismissed the first bill, on the ground that they had no jurisdiction, which shows that the case was not heard on its merits. And this also appears from the dismissal by the party, of the second bill, in the clerk's office.

It is also insisted, that the decrees of the circuit court should be reversed, on the ground that there is an improper joinder of parties. Were it not for the agreements on the record, the decrees entered in the different cases would be wholly irregular, and of course, unsustainable. Different inter-

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ests and parties are united, and a decree is made in each case, which determines the matters of controversy in each. But the agreement of the parties, spread upon the record, and that which is stated by the court, and the fact of all the causes being brought to a hearing and submitted at the same time, afford the most satisfactory evidence of the assent of the parties, and the waiver of all objection to the irregularity of the proceeding. And we are inclined to this view, from the consideration, that by this mode of procedure, the rights of the parties concerned could in no respect be prejudiced. They were as susceptible of as distinct an investigation and decision, as if the pleadings had been fully made up in each case, and it had been heard separately. Where parties, by agreement, dispense with the usual formalities in the progress of a cause, and no injustice results from the mode *162] adopted, the court should not, on slight ground, set aside the proceeding.

It is contended, that as the complainants, or at least some of them, entered under the title of Walden, as purchasers from Craig, the principle of landlord and tenant applies; at least, so far as to prevent the setting up of a title adverse to that under which they entered. Craig claimed a certain part of the entry of Walden, as purchaser under Kenton, the locator; and he sold to some of the complainants; but as his title was not sustained, the purchasers under him become interested in the entries of Bodley and others, and received conveyances from them. It is a general rule, that a tenant shall not dispute his landlord's title; but this rule is subject to certain exceptions. If a tenant disclaims the tenure, and claims the fee in his own right, of which the landlord has notice, the relation of landlord and tenant is put an end to, and the tenant becomes a trespasser, and is liable to be turned out of the possession, though the period of his lease has not expired. 3 Pet. 47. The same relation as that of landlord and tenant subsists between a trustee and the *cestui que trust*, as it regards the title. In the case of *Botts v. Shield's Heirs*, 3 Litt. 34-5, the court of appeals decided, that a purchaser of land, who enters into the possession of it, under an executory contract, shall not set up another title. But a purchaser who has obtained a conveyance, holds adversely to the vendor, and may controvert his title. 4 Litt. 274.

It appears from Kenton's deposition, that he was paid in land-warrants for making Walden's entry, and that he had not, in fact, a shadow of right to any part of this land. He assigned the contract with Walden to locate the land, to Fox and Wood; and afterwards paid them in discharge of this contract, by a conveyance of land, located by the land-warrants received from Walden; but the contract was not surrendered nor cancelled. So that Craig, as purchaser, procured neither the equitable nor legal title to any part of the land in Walden's entry.

The claim of Craig appears to have been purchased by Bodley and others, who at the time claimed under conflicting and adverse entries to that of Walden, with the assent of the first purchasers from Craig; and then deeds were executed to them. The original purchasers from Craig, who afterwards received deeds from Bodley and others, are deceased; and the lapse of time, and change of circumstances, have been so great, that we do not think the complainants, or any part of them, can be precluded, on the ground of their purchase from Craig, from setting up a title adverse to that of

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Walden's. The persons who entered under Craig were, in fact, trespassers ; for they had no title which could protect their possession, or shelter them from the consequences of wrongdoers. But on this point we go no further than to say, that such an entry, under the circumstances of this case, does not preclude *the complainants from relying on the adversary titles [*163 set up in their bill. Whether any other effect may result from this entry, as it regards any other right than the title asserted in the bill, we do not decide.

The counsel for the appellant contend, that the decree of the circuit court should be reversed, on the ground, that although Walden was decreed to release his title to such parts of the land covered by his original survey, and not included in the survey of his entry under the order of the court, yet the tenants on the land to which Walden had the better title were not required to execute releases of their title to him. But we think there is no error in the decree in this respect. Walden had the elder legal title for the land included in his first survey ; it was, therefore, necessary to decree a conveyance or release from him to the tenants who established a paramount equitable title. But as to the land within the corrected survey, he had the elder equitable as well as legal title ; it was, therefore, unnecessary to decree releases from the tenants, who, from facts before the court, had neither the equitable nor legal title.

There are other considerations which show the correctness of the decree in this respect. The tenants in possession were not parties to the suit ; and the court did not know the nature or extent of their right. It was clear, that so far as their right was made known to the court by the bill and answer, they had no title to release. Not being parties to the suit, it is very clear, that the court could not divest them of any interest which was not divested, as a legal consequence of the recovery of the ejectment suits. Forty years have nearly elapsed since Walden recovered his judgments. Delays, perhaps without precedent in this country, have occurred in realizing the fruits of these judgments. To some extent, these delays may be attributed to the expiration of the demises ; but they are chiefly to be ascribed to the injunctions which have been granted. And now the demises, though extended fifty years from 1789, have again expired. And it appears from the records in the ejectment cases, which are before us as evidence, that the decease of some of the defendants renders a revivor of the judgments necessary, before writs of possession can be issued.

When the final decree was entered in the circuit court, the demise had some years to run ; and that court, we think very properly, refused to decree a surrender of the possession by the tenants to Walden, but dissolved the injunction. This, under ordinary circumstances, would have given to Walden all the relief he could ask ; and, as was said by the counsel for the complainants, all the relief he prays for in his answer. But new and unexpected delays have occurred, until the demises have expired ; and the judgments have become dead, by the decease of a part of the defendants.

And a question here arises, whether, on the affirmance of the decrees *of the circuit court, it is not the duty of this court, under the cir- [*164 cumstances of this case, to direct the circuit court to have the value of the improvements estimated, the rents and profits ascertained, and also any damage which may have been done to the land ; and then, under an

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order or decree that the tenants should relinquish the possession to Walden, to issue a writ of possession, in pursuance of the practice of a court of chancery in Kentucky. This in effect would be the same as the decree of the circuit court; and it would seem, that it is the only effectual mode by which this protracted controversy can be terminated, within any reasonable time. The remedy at law is obstructed by the expiration of the demises, and the death of defendants in the judgments. And if this court have the case before them so as to send it down with the above directions, we think they are bound to do so. It would be a reproach to the administration of justice, if in this case, the parties should be left, by the decision of this court, apparently, as remote from a final determination of it, as they were forty years ago. It is true, the answer prays merely for a dissolution of the injunction, and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out, in detail, the means which the court shall adopt in giving relief. Under the general prayer for relief, the court will often extend relief beyond the specific prayer, and not exactly in accordance with it. Where a case for relief is made in the bill, it may be given, by imposing conditions on the complainant, consistently with the rules of equity, in the discretion of the court.

In their decree, the circuit court required Walden to surrender the possession of the land he was directed to release to the complainants; and the court had, unquestionably, the power to decree a surrender of the possession to Walden, by the tenants of the land recovered by him. This was not done, it is presumed, because it was thought the possession could be obtained under the judgments, on the dissolution of the injunction. But this, for the reasons stated, cannot now be done. The remedy under the judgments, as they now stand, must be attended with additional expense and delay; and having the case before us, we think it is our duty to put an end to this controversy. Forty years ago Walden recovered the land by virtue of his legal right; and we now decide in favor of his equity. He should, therefore, have the aid of the court in attaining the object he has so long and so perseveringly pursued; and that without unnecessary delay.

Being satisfied with the decrees made in the cases stated by the circuit court, they are affirmed, with the following modification: The cause will be sent down to the circuit court, with directions to take such steps in regard to the improvements, and to the putting *of Walden or his *165] representative in possession of the premises recovered in the ejectment suits, as shall be conformable to the decrees affirmed, and the principles of equity. And as it regards any title or claim which the tenants or any part of them may set up under the statute of limitations; as the proper parties are not before us, nor the necessary facts, we do not decide on such title or claim.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decrees of the said circuit court

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in the cases stated by the said circuit court be and the same are hereby affirmed; with the modification, that this cause be and same is hereby remanded to the said circuit court, with directions to that court to take such further steps in regard to the improvements, and to the putting of Walden or his representative in possession of the promises recovered in the ejectment suits, as shall be conformable to the decrees hereby affirmed, and to the principles of equity.¹

*JEFFERSON S. EDMONDS and others, Appellants, v. ANDERSON [*166
CRENSHAW, Appellee.

Powers and responsibilities of executors.

Where there are two executors in a will, it is clear, that each has a right to receive the debts due to the estate, and all other assets which shall come into his hands; and he is answerable for the assets he receives; this responsibility results from the right to receive, and the nature of the trust. A payment of the sums received by him to his co-executor, will not discharge him from his liability to the estate; he is bound to account for all assets which come into his hands, and to appropriate them according to the directions of the will.²

Executors are not liable to each other; but each is liable to the *cestuis que trust* and devisees, to the full extent of the funds received by him.

The removal of an executor from a state in which the will was proved, and in which letters-testamentary were granted, does not discharge him from his liability as executor; much less does it release him from his liability for assets received by him and paid over to his co-executor.

APPEAL from the Circuit Court for the Southern District of Alabama. The appellee, with one James McMorris, was, by the will of Aaron Cates, of South Carolina, made on the 8th day of February 1816, and proved on the 15th of the same month, appointed executor of the will. Letters-testamentary were granted to both the executors. The will directed the estate of the testator to be sold; and after the payment of the debts, directed the executors to invest the residue of the proceeds of the estate in stocks, for the benefit of certain persons named in the will; and who were appellants in this case. The estate was sold, and the accounts were settled by the executors with the ordinary. The executors failed to invest the proceeds of the sales in stocks. This bill was filed to compel a performance of the directions of the will by the appellee.

The defendant in the circuit court, stated in his answer, that the moneys of the estate were not invested in stocks, in consequence of the opposition of one of the legatees, a complainant in the bill; and because the sums collected were not sufficiently large. That, although at the time of the taking out the letters-testamentary, he was a resident of South Carolina, yet, that in 1819, he removed to Alabama, having first delivered over to his co-executor, McMorris, all the assets of the estate which had ever come to his hands, and took the receipt of the co-executor for the same, which receipt he filed with the court of ordinary which had granted the letters-testamentary, and surrendered to the co-executor the exclusive management of the estate of the testator. McMorris had become insolvent.

The case was heard on the bill, answer and the receipt; and the circuit

¹ For a further decision in this long pending case, see 9 How. 34.

² See notes to Brown's Appeal, 1 Dall. 311.

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court ordered the bill to be dismissed. From this decree, an appeal was prosecuted to this court.

*167] The case was argued by *Key*, for the appellants. No counsel appeared for the appellee.

For the *appellants*, it was contended, that the defendant was bound to invest the proceeds of the sales in the stocks, as directed by the will of Aaron Cates; and that for any loss occasioned by his failure to do so, he was liable. The renunciation was of no effect. No discharge from liabilities as executor can be obtained, without the action of the court. His liabilities continued, and they were not changed or diminished by his removal to Alabama. The receipt given to him by his co-executor had no operation on his responsibilities under the will. While it will be admitted, that one executor is not liable for payments made to a co-executor; it is denied, that a payment of the money by one executor to another, instead of a compliance with the will, by investing the money, has no effect on those liabilities. Cited, 1 Williams on Executors 148-9; Ambl. 117; 2 P. Wms. 1124; 1 Vent. 335; 2 Bro. C. C. 117; 2 P. & W. 498; Prec. in Chan. 173; 2 Sch. & Lef. 245; 7 East 246; 11 Johns. 16, 116; 16 Ves. 478; 1 Merriv. 711; 1 P. Wms. 241.

McLEAN, Justice, delivered the opinion of the court.—This is an appeal from the circuit court of Alabama. The complainants represent themselves to be the devisees of Aaron Cates, deceased, who, on the 7th of February 1816, made his will, in which he required all his estate, both real and personal, to be sold at public auction, by his executors, on a credit of one, two and three years; the purchaser to give two good freehold securities and a mortgage on the property, to secure the payments. Three bequests, of \$100 each, were made to certain individuals, to one of whom he gave his wearing apparel. After the payment of these bequests, his funeral expenses, and ten per cent. on moneys collected by his executors, he directed that his executors should vest the entire balance, including the net proceeds of his estate then in their hands, in bank-stock, or in shares or capital of such companies or corporations as in their judgments should be most proper and productive, in trust for certain uses, and subject to certain restrictions; and he appointed "his friends, Anderson Crenshaw and James McMorris, executors; and on the death of either, the survivor was to be sole executor, with power of appointing, either by deed or by will, a proper person to carry into effect the provisions of the will." On the death of the testator, the executors proved the will in the ordinary's office for Newberry district, in the state of South Carolina, and qualified as executors. They caused the property to be appraised and sold, and made returns thereof to the above office; the sale-bill, they allege, amounted to the sum of \$21,144. And the *168] complainants state, that at the time of his decease, the testator had a considerable sum of money on hand, and that many debts on accounts, notes, bonds and mortgages, were due to him; and afterwards came into the hands of his executors.

The bill alleges, that the defendant, one of the executors, some years since, removed from the state of South Carolina to the state of Alabama, without vesting or causing to be vested any part of the funds belonging to

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the estate, in the hands of the executors. That the defendant left the state of South Carolina, without settling the estate or accounting for the funds which came into his hands; that McMorris continued to act as executor; and that there is in the hands of the executors about the sum of \$16,000, funds of the estate; and that they have neglected and refused to account for and pay over the same. That McMorris is insolvent; and the complainants pray that the executors may account, &c.

The defendant, Crenshaw, in his answer, admits that Aaron Cates made the will, as stated in the bill, and that it was proved; that he was qualified with McMorris as executor, made the returns to the ordinary as stated, but does not recollect the amount of the estate. He states, that a part of the estate sold by the executors was recovered from the purchasers, by others; and that debts to a considerable amount were paid by the executors. He admits, that in the year 1819, he removed to Alabama; and that the executors, previous to this time, made no investment of the funds, because the amount on hand was small, and Mrs. Wadlington, one of the legatees, and only daughter of the testator; and who was the natural guardian of her then infant children, who were the principal legatees, opposed such investment by every means in her power. And the defendant states, that before he left South Carolina, he surrendered up and delivered over to McMorris, his co-executor, all the assets of the estate which had come to his hands; including cash, evidences of debt, and other liabilities; and took from him a receipt, which is made a part of the answer. That until this time, he and his executor had made correct returns to the ordinary of their proceedings; and that since then, he has not intermeddled with the estate. The parties agreed to go to a hearing on the bill and answer; and that the receipt referred to in the answer given by McMorris to the defendant, should be considered as duly proved.

On the bill, answer and receipt, the question arises, whether the defendant is discharged from the trust under the will? Where there are two executors in a will, it is clear that each has a right to receive the debts due to the estate, and all other assets which shall come into his hands; and he is responsible for the assets he receives. This responsibility results from the right to receive, and the nature of the trust; and how can he discharge himself from this responsibility? In this case, the defendant has attempted to discharge himself from responsibility by paying over the assets received by him to *his co-executor. But such payment cannot discharge him. Having received the assets in his capacity of executor, [*169 he is bound to account for the same: and he must show that he has made the investment required by the will, or in some other mode, and in conformity with the trust, has applied the funds. One executor, having received funds, cannot exonerate himself, and shift the trust to his co-executor, by paying over to him the sums received. Each executor has a right to receive the debts due to the estate, and discharge the debtors; but this rule does not apply as between the executors. They stand upon equal ground, having equal rights, and the same responsibilities. They are not liable to each other, but each is liable to the *cestuis que trust*, to the full extent of the funds he receives. *Douglass v. Satterlee*, 11 Johns. 16; *Fairfax's Executors v. Fairfax*, 5 Cranch 19.

The removal of the defendant from the state did not render him incapa-

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ble of discharging his duties as executor ; much less did it release him from the assets he received and paid over to his co-executor. In the case of *Griffith v. Frazier*, 8 Cranch 9, this court held, "that an executor who absents himself from the state, after taking out letters-testamentary, is still capable of performing, and is bound to perform, all the duties of executor." This was a case where there was but one executor.

The liability of the defendant arises under the laws of South Carolina, which regulated his duties as executor. He is responsible for all the assets of whatsoever kind which came into his hands as executor ; and which he has not accounted for and paid over, as directed by the will.

The circuit court held, that the facts set up in the answer, with the receipt of his co-executor, releases the defendant from his trust ; and from all responsibility under it. In this the court erred, and their decree, on this ground, is reversed and annulled ; and the cause is remanded to that court, with directions to have an account taken of all the assets which came into the possession of the defendant as executor, and to enter a decree in favor of the complainants against him, for the amount he shall have received and not accounted for to the ordinary, and paid over, in conformity with this opinion.

Decree reversed.

*170] *RICHARD RAYNAL KEENE, Plaintiff in error, *v.* WARREN WHITAKER, LAURA WADE, GEORGE DOUGHERTY, FRANCIS MARKS and C. CUNNINGHAM, Defendants in error.

Cession of Louisiana.

The case of *Foster v. Neilson*, 2 Pet. 254 ; and *Garcia v. Lee*, 12 Ibid. 511, which cases decide against the validity of the grants made by the Spanish government, in the territory lying west of the Perdido river, and east of the Mississippi river, after the Louisiana treaty of 1803, cited and affirmed.

APPEAL from the Circuit Court for the Eastern District of Louisiana. On the 26th November 1833, the appellant filed a petition in the circuit court of the eastern district of Louisiana, claiming under conveyances to him from Daniel Clarke, deceased, a tract of land, of 947 acres, part of 50,000 arpents, which, in 1804, had been granted by the Spanish intendant, Don Juan Ventura Morales, in the name of the Spanish government, to Don Gilberty Andry, who was the vendor of part of the tract to Daniel Clarke. This tract was situated in that part of what was alleged to be a part of Louisiana, by the United States, between the river Perdido and the river Mississippi, they claiming the same under the cession of France to the United States of Louisiana. The United States had asserted that this country had been transferred to France by Spain, by the treaty of St. Ildefonso, of 1800, and under the treaty with France belonged to the United States. Under this claim, the United States had caused sales of the land to be made ; and the defendants in error had become the purchasers under the United States, of the tract which the petitioner asserted to belong to him under the grant to Don Gilberty Andry. The petition prayed proceedings against those who had purchased from the United States ; and all just and legal aid in the premises.

The defendants, in their answer to the petition, alleged, that subsequently

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to the treaty of St. Ildefonso, of 1800, the Spanish government never had any right or title to the property claimed. By that treaty, the whole of the territory lying between Mississippi and the Perdido, including the land claimed by the plaintiff, belonged, under the treaty with France, to the United States. The property of the defendants was held under titles from the United States. The circuit court made a decree against the plaintiff, who, thereupon, prosecuted this writ of error.

The case was submitted to the court, by *Key* and *Jones*, the counsel for the plaintiff in error, without argument.

*TANEY, Ch. J., delivered the opinion of the court.—This case comes up by writ of error from the circuit court of the United States [*171 for the district of East Louisiana. It has been submitted by the counsel for the plaintiff in error, without argument; and upon looking at the case as agreed on and stated by the parties in the court below, it is evident, that the principles laid down in the case of *Foster v. Neilson*, 2 Pet. 254, and *Garcia v. Lee*, 12 Ibid. 511, must decide this case against the plaintiff. The judgment of the circuit court must, therefore, be affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*JAMES TAYLOR, Appellant, v. NICHOLAS LONGWORTH and THOMAS [*172 D. CARNEAL, Appellees.

Specific performance.

Specific performance of a contract by T., for the sale by him of a lot of ground in the city of Cincinnati, was asked, by a bill filed in the circuit court for the district of Ohio, by L. The complainant in the bill had purchased the lot, and had paid, according to the contract, the proportion of the purchase-money payable to T.; by the contract, a deed, with a general warranty, was to have been given by the vendor, within three months, on which a mortgage for the balance of the purchase-money was to have been executed by the purchaser; this deed was never given, nor offered; the purchaser went into possession of the lot, improved it, by building valuable stores upon it, and sold a part of it. A subsequent agreement was made with the vendor, as to the rate of interest to be paid on the balance of the purchase-money, the purchase was made in 1814, and the interest, as agreed upon, was regularly paid until 1822, when it was withheld. In 1822, the vendor instituted an action of ejectment for the recovery of the property, and he obtained possession of the same in 1824. In 1819, the purchaser was informed that one Chambers and wife had a claim on the lot, which was deemed valid by counsel; and in 1823, a suit for the recovery of the lot was instituted by Chambers and wife against T. L. and others, which was depending until after 1829. In 1825, this bill was filed, claiming from T. a conveyance of the property under the contract of 1814, on the payment of the balance of the purchase-money and interest. The circuit court decreed a conveyance; and the decree was affirmed by the supreme court.

After the filing of the original bill, amended bill, and answers, the circuit court considered that C., who held a part of the lot purchased by L., should be made a party complainant; and he came in and submitted to such decree as might be made between the original parties: *Held*, that this was regular.

There is no doubt, that time may be of the essence of a contract for the sale of property; it may be made so by the express stipulations of the parties, or it may arise by implication, from

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the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not, thus, either expressly or impliedly, of the essence of the contract, if the party seeking a specific performance has been guilty of gross *laches*, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period, been a material change in circumstances, affecting the rights, interests or obligations of the parties, in all such cases, courts of equity will refuse to decree any specific performance, upon the plain ground, that it would be inequitable and unjust. But except under circumstances of this sort, or of an analogous nature, time is not treated by courts of equity as of the essence of the contract; and relief will be given to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. In all such cases, the court expects the party to make out a case free from all doubt, and to show that the relief which he asks is, under all the circumstances, equitable; and to account in a reasonable manner for his delay and apparent omission of duty.¹

The rule that the purchaser of property shall prepare and tender a deed of conveyance of the property to the vendor, to be executed by him, although prevailing in England, does not seem to have been adopted in some of the states of the United States. In Ohio, the rule does not prevail; the local practice ought certainly to prevail, and to constitute the proper guide in the interpretation of the terms of a contract.

Longworth v. Taylor, 1 McLean 395, affirmed.

APPEAL from the Circuit Court of Ohio. The appellee, Nicholas Longworth, brought a suit, by a bill, in the circuit court of Ohio, for a specific performance of a contract made with James Taylor, for the sale, by Taylor to him, of a lot of ground in the city of Cincinnati. Afterwards, Thomas *173] D. Carneal *was made a party to the proceedings. The circuit court made a decree in favor of the complainants; and the defendant, James Taylor, prosecuted this appeal. The facts of the case are stated fully in the opinion of the court. It was submitted to the court, on printed arguments, by *Storer* and *Fox*, for the appellant; and by *Chase*, for the appellees.

STORY, Justice, delivered the opinion of the court.—This is an appeal from a decree of the circuit court of Ohio, in a suit in equity, brought by Longworth, the appellee, against Taylor, the appellant, for a specific performance of a contract for the purchase of land. The facts, so far as they are important, to be considered upon the present appeal, are as follows:

On the 5th of April 1814, by a sealed contract between the parties, Longworth purchased of Taylor part of a lot in Cincinnati, No. 81, for the price of \$125 per foot in front, whatever measurement it should hold out, one-third payable on signing the contract, one-third in six months, and the remaining third in twelve months. A deed of general warranty was to be given by Taylor, in the course of three months; and a mortgage was to be given on the premises, by Longworth, to secure the remaining payments. On the same day, by a written indorsement on the contract, Taylor acknowledged the receipt of the sum of \$2458.33, "supposed to be about the first payment." The whole purchase-money, upon the admeasurement of the lot, amounted to \$7406.25. No deed was executed by Taylor, according to the contract, nor at any time subsequent; but Longworth was put in immediate possession of the lot. When the second instalment of the purchase-money became due, it was not paid; but by an arrangement between the parties, it was postponed, upon Longworth's agreeing to pay

¹ And see *Ahl v. Johnson*, 20 How. 511.

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the same interest annually thereon, as was received for dividends upon stock in the Miami bank, which was nine or ten per cent. This interest was accordingly paid up to near the close of the year 1819; and in the intermediate time, Longworth caused four houses to be built, for stores, on the lot, at the cost of about \$4464. In the year 1819, or the beginning of 1820, Longworth was informed that one Chambers and his wife had a claim on the lot, which was deemed valid by the counsel employed to investigate it; and that a suit would be commenced on it. A suit was accordingly commenced in equity, against Taylor, Longworth and others, in November 1823, which was not determined until after 1829. In September 1822, no interest on the purchase-money having been paid by Longworth, after 1819, Taylor commenced an action of ejectment against Longworth, for the lot; and recovered possession thereof in August 1824.

In June 1825, the present bill in equity was brought by Longworth, *for a specific performance of the original contract for the purchase of the lot. In the progress of the cause, several supplementary and [*174 amended bills were filed; and after the answers were put in, and the evidence taken, the cause came on to be heard; and the court being of opinion, that one Carneal, a citizen of Ohio, who was assignee of one Canby, a sub-purchaser of a part of the lot from Longworth, ought to be made a party to the suit, the cause was directed to stand over; and he was accordingly made a party plaintiff, and came in and submitted to such decree as might be made by the court in the case, as it then stood between the original parties. The cause was afterwards fully argued, and a decree for specific performance was pronounced; from which the present appeal has been taken.

Some question has been suggested in respect to the propriety of making Carneal a party at so late a stage of the cause; and of the right of Taylor, in virtue thereof, to insist, by way of plea, upon his exemption from being sued, except in the district of Kentucky, where he resided. But we do not think that there is any valid objection to the proceedings on this account. By this general appearance to the suit, in the prior proceedings, Taylor necessarily waived any objection to the suit, founded on his residence in another district; and he became, like every other party properly before a court of equity, subject to all the orders of the court. Whether Carneal, as a sub-purchaser, was an indispensable party, under all the circumstances of the case, may admit of doubt; but, as his being made a party in no respect changed the actual posture of the case as to the other parties, he merely submitting to be bound by the proceedings, we see no objection to his joinder in that stage of the cause, which in any degree touches either the propriety or the validity of the decree.

The only substantial question in the cause is, whether, under all the circumstances, the plaintiff, Longworth, is entitled to a specific performance of the contract for the purchase? and upon the fullest consideration, we are of opinion, that he is, and that the decree is therefore right. We shall now proceed to state, in a brief manner, the grounds upon which we hold this opinion.

In the first place, there is no doubt, that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication, from the very nature of the property, of the avowed objects of the seller or the purchaser. And

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even when time is not, thus, either expressly or impliedly, of the essence of the contract, if the party seeking a specific performance has been guilty of gross *laches*, or has been inexcusably negligent in performing the contract on his part ; or if there has, in the intermediate period, been a material change of circumstances, affecting the rights, interests or obligations of the parties ; in all such cases, courts of equity will refuse to decree any specific performance, upon the plain ground, that it would be inequitable and unjust.

*175] But except under circumstances of this sort, or of an analogous *nature*, time is not treated by courts of equity as of the essence of the contract ; and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases, the court expects the party to make out a case free from all doubt ; and to show that the relief which he asks is, under all the circumstances, equitable ; and to account in a reasonable manner for his delay, and apparent omission of his duty. It does not seem necessary to cite particular authorities in support of these doctrines, although they are very numerous. It will be sufficient to refer to the cases of *Pratt v. Carroll*, 8 Cranch 471 ; *Pratt v. Law*, 9 Ibid. 456, 493-4, and *Brashier v. Gratz*, 6 Wheat. 528, in this court ; and to *Seton v. Slade*, 7 Ves. 265 ; *Halsey v. Grant*, 13 Ibid. 73, *Alley v. Deschamps*, Ibid. 225 ; *Hearne v. Tenant*, Ibid. 289, and *Hipwell v. Knight*, 1 Younge & Coll. 415, in England, as affording illustrations in point.

In applying the doctrines above stated to the facts and circumstances of the present case, the first remark that occurs, is, that the first default was on the part of Taylor. By his contract, he undertook to make a deed of general warranty of the premises, in the course of three months after the date of the contract ; the second instalment not being payable until a long time afterwards. He never made any such deed, nor offered to make it ; and if he had, it is obvious, that instead of his being placed in the situation of a defendant in equity, as he now is, he would have been compelled to be a plaintiff, either to enforce a specific performance, or to rescind the contract. Now, the plain import of the words of his contract is, that he will make the deed. The excuse for the omission is, that it was the duty of the other side to prepare and tender a formal deed to him for execution. And authorities are relied on, principally from the English courts, to show, that in all cases of this sort, the established rule is, that the vendee shall prepare and tender the conveyance. This is certainly the rule in England, founded, doubtless, upon the general understanding and practice among conveyances, as well as upon the peculiar circumstances attendant upon conveyances in that country. The same rule does not seem to have been adopted generally in America, although it may be adopted in some states. In Ohio, the rule is stated by the learned judge who decided the present case, not to prevail ; and the local practice, in a case of this sort, ought certainly to constitute the proper guide in the interpretations of the terms of the contract. But waiving this consideration, let us proceed to others presented by the case.

Up to the close of the year 1819, there is no pretence to say, that there had been any violation of the contract on the part of the Longworth ; and no step whatever was taken by Taylor, until he brought the ejectment in

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1822, to enforce the contract. That ejectment he asserts in his answer to have been brought in order to compel *Longworth to complete [*176 the contract, or to put an end to it. In the meantime, Longworth had been left in the possession of the premises, under the contract, had made improvements upon them, and had received the rents and profits, with the acquiescence of Taylor. Under such circumstances, where there had been a part performance, and large expenditures on one side, under the contract, and acquiescence on the other side; it would be incompatible with established doctrines, to hold that one party could, at his own election, by a suit at law, put an end to the contract. It could be rescinded by Taylor, only by the decree of the court of equity; which decree would, of course, require full equity to be done to the other party, under all the circumstances. Pending the ejectment, Longworth made several propositions for payment, varying from the original conditions, all of which were declined by Taylor; although, it seems, that Longworth supposed that some of them would have been satisfactory. The recovery in the ejectment was, of course, successful, as the legal title was in Taylor; and the equities of Longworth could not be matters of defence to that suit.

The present bill was brought in the succeeding year; and the question is, whether, under all the circumstances of the case, Longworth is now entitled to a specific performance of the contract, upon his paying all the arrears of the purchase-money. Undoubtedly, if there were no grounds of excuse shown, accounting for the delay on his part to fulfil the contract, between September 1822, when the ejectment was brought, and June 1825, when the present bill was filed; there might be strong reason to contend, that he was not entitled to a specific performance of the contract, even if some other relief, on account of his improvements, might be deemed equitable. But in point of fact, the adverse claim of Chambers and wife to the property, was made known as early as the year 1820; and was asserted by counsel, who were consulted on that occasion, to be valid. The claim was prosecuted (as has been already stated) by a suit in equity, brought in 1823, against Taylor, Longworth and others; and remained undecided until the close of the year 1829. There is no pretence to say, that this claim was not *bonâ fide* asserted, or that Longworth brought it forward to cover his own default. While it was known and pending, there is as little pretence to say, that Longworth could be compelled to complete the contract on his side; or that he had not a right to lie by, and await the decision of the title, which thus hung, as a cloud, upon that of Taylor. It is one thing to say, that he might waive the objection, and require a conveyance on the part of Taylor; and quite another thing to say, that he was compellable, at once, to elect, at his peril, either to proceed on the contract, or to surrender it. There is no ground to assert that, from the commencement of the present suit, Longworth has not always been ready and willing to pay up the arrears of the purchase-money, and to complete the contract. The proofs in the case are entirely satisfactory on this head. In our opinion, *the lapse of [*177 time is fairly accounted for by the state of the title; and therefore, Longworth has not been guilty of any delay, which is unreasonable or inexcusable.

There is another view of this subject, which seems equally decisive of the merits of this controversy. If the contract had been strictly performed

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on the part of Taylor, by a conveyance, he would now have stood in the mere character of a mortgagee; for in that event, Longworth stipulated to give him a mortgage for the security of the unpaid purchase-money. Now, in the view of a court of equity, that may well be deemed the true posture of this case; upon the known principle, that equity will, for the purposes of justice, treat that to have been done, which ought to have been done. As mortgagee, which would be his character according to the real intention of both parties, Taylor could have no right to complain of the lapse of time; and could have no claim to the improvements made by Longworth, except as security for his debt. In this view of the matter, it is wholly unimportant for us to consider, whether the amount of the rents and profits received by Longworth, was equal to, or a set-off to, his expenditures and improvements, as affirmed in the answer. Upon the whole, we are entirely satisfied with the decree of the circuit court, and it is affirmed, with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel: On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*178] *The Lessee of HENRY BREWER, Plaintiff in error, v. JACOB BLOUGHER and DANIEL BLOUGHER, Defendants in error.

Illegitimacy.

Construction of the act of the legislature of Maryland, passed December session 1825, entitled "an act relating to illegitimate children," which provides, that "the illegitimate child or children of any female, and the issue of any such child or children," are declared capable in law "to take and inherit both real and personal estate from their mother and from each other, and from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock."

J. S., who had several children who were the children of an incestuous connection, conveyed a tract of land in the state of Maryland to one of those children; the grantee died intestate and without issue, seised in fee of the land; two brothers and one sister of this incestuous intercourse survived him: *Held*, that under the act of Maryland, "relating to illegitimate children," they inherited the estate of their deceased brother.

It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it. According to the principles of the common law, an illegitimate child is *filius nullius*, and can have no father known to the law; and when the legislature speaks in general terms of children of that description, without making any exceptions, the court is bound to suppose they design to include the whole class.¹

ERROR to the Circuit Court of Maryland. An action of ejectment was instituted by the plaintiff in error, a citizen of Pennsylvania, in the circuit court of the United States for the district of Maryland, for the recovery of a tract of land, situated in Allegany county, in the state of Maryland, called "part of Grassy Cabin." The following were the facts of the case, as agreed upon by the parties to the suit.

John Sloan, late of Allegany county, was twice married; by his first

¹ On this subject, see note a, to 5 Wheat. 262.

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wife, he had but one child, namely, Mary Sloan ; and by his second wife, he had the following children, namely, William Sloan, John Sloan, Elizabeth Sloan, Peggy Sloan, Sally Sloan and Jane Sloan ; the plaintiff's lessor was the husband of the said Elizabeth. After the death of his second wife, John Sloan lived and cohabited with and married Mary Sloan, his daughter by his first wife, and had by her the following children, viz., William Sloan, John Joseph Sloan, Mary Sloan, Jesse Sloan and David Sloan ; William Sloan was since dead.

The said John Sloan, the father, was, many years ago, seised and possessed of a tract of land lying in Allegany county, Maryland, called "Grassy Cabin," containing 427 $\frac{1}{4}$ acres, to which tract he had an undisputed legal title. The said John Sloan being so seised and possessed of the said tract of land, conveyed the same, for a valuable consideration, by a deed of bargain and sale, duly executed, acknowledged and recorded according to law, to John Joseph Sloan, and that the said *John [*179 Joseph Sloan became and was seised and possessed of the said tract of land, under and by virtue of the said deed.

The said John Sloan, the father, and Mary Sloan, his said daughter by his first wife, both departed this life, about the year 1826, and the said John Joseph Sloan died about the year 1832, seised and possessed of the said tract of land, intestate, and without issue, and unmarried ; leaving Mary Sloan, Jesse Sloan and David Sloan, his brothers and sister, children of the said Mary Sloan, by her said father as aforesaid, him surviving. The said Mary Sloan, Jesse Sloan and David Sloan, being possessed of and claiming title to the said tract of land, called "Grassy Cabin," by descent from the said John Joseph Sloan, conveyed the same, by a deed of bargain and sale, duly executed, acknowledged and recorded according to law, to Jacob Blougher and Daniel Blougher, the defendants.

After the death of the said John Joseph Sloan, the plaintiff, Henry Brewer, obtained out of the Western Shore land-office, a special warrant of escheat, to re-survey and affect the said tract of land, called "Grassy Cabin," for an alleged want of the heirs of John Joseph Sloan, who died seised thereof, in fee, and intestate as aforesaid ; and the patent was granted to the said Henry Brewer. The patent was in legal form, and recited the escheat of the land, "for want of heirs of John Joseph Sloan, who died seised of the premises."

The question for the decision of the circuit court, upon these facts, was, whether, upon the death of the said John Joseph Sloan, according to the laws and statutes of Maryland, the said tract of land, "Grassy Cabin," did not pass by descent to the said Mary Sloan, Jesse Sloan and David Sloan, his illegitimate sister and brothers as aforesaid. If the court should be of opinion, that the said tract of land did not so pass by descent, then judgment to be given, with costs, for the plaintiff. If the court should be of opinion, that the said tract of land did so pass by descent, then judgment to be given, with costs, for the defendants. Either party to be at liberty to appeal or sue out a writ of error ; it being admitted, that the value of the land in controversy was at least \$2500. The circuit court gave a judgment for the defendants ; and the plaintiff prosecuted this writ of error.

The case was argued by *Pigman*, for the plaintiff in error, who also sub-

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mitted a printed argument by *Mayer*, also for the plaintiff. A printed argument for the defendants was submitted to the court by *Price*.

Pigman, for the plaintiff.—The plaintiff in error, being a citizen of the state of Pennsylvania, claiming title to the tract of land called “part of Grassy Cabin,” which is mentioned in the declaration in the record, as being in Allegany county, in the state of Maryland, brought his action of *ejectment against the defendants in error, residing in the latter state, *180] in the circuit court of the United States for the district of Maryland, to try his title to said tract of land. The plaintiff holds title to his land, by patent from the state of Maryland, issued by the legal authorities of that state, upon an escheat warrant from the land-office, by virtue of the acts of Maryland, of October session 1780, ch. 51, § 5, and 1781, ch. 20, § 8. The plaintiff applied to the land-office of the state of Maryland for his escheat warrant, upon the ground, that one John Joseph Sloan died in the state of Maryland, intestate, seised in fee-simple of the land mentioned in his patent, without issue, and without heir or heirs who could have inherited. The facts upon which the questions of law will arise are settled by agreement filed by consent, and make part of the record.

The act of 1780, ch. 51, § 5, enacts, “that any lands within the state of Maryland, of which any person shall die seised in fee-simple, without any heir of the whole blood who could inherit, or without leaving any relative of the half blood, such lands shall escheat to the state.” And by the act of 1781, ch. 20, § 8, escheat warrants are authorized to be issued from the land-office, “when the owner shall die intestate, seised in fee-simple, without having any relation of the half blood, within two degrees, as the same are reckoned by the common law, and without leaving any relation who might inherit.”

It appears by the agreement of counsel filed in the cause, that one John Sloan, late of Allegany county, was twice married : by his first wife, he had but one child, namely, Mary Sloan ; and by his second wife, he had the following children, namely, William Sloan, John Sloan, Elizabeth Sloan, Peggy Sloan, Sally Sloan and Jane Sloan. After the death of his second wife, the said John Sloan lived, and cohabited with, and married, Mary Sloan, his said daughter by his first wife ; and had by her the following children, namely, William Sloan, John Joseph Sloan, Mary Sloan, Jesse Sloan and David Sloan ; and that William Sloan is since dead. The said John Sloan being seised and possessed of a tract of land lying in Allegany county, called “Grassy Cabin,” containing 427½ acres, conveyed the same, by deed of bargain and sale, for a valuable consideration, to the said John Joseph Sloan. The said John Joseph Sloan died about the year 1832, seised and possessed of the said tract of land, intestate, and without issue, and unmarried, leaving Mary Sloan, Jesse Sloan and David Sloan, his brothers and sister, children of the said Mary Sloan, by her father, as afore-said. The said Mary, Jesse and David conveyed the said tract of land, by deed, to Jacob Blougher and Daniel Blougher, the defendants. After the death of the said John Joseph Sloan, the plaintiff in error obtained out of *181] the Western Shore land-office, in the state of Maryland, *a warrant of escheat, to re-survey and affect the said tract of land, called

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"Grassy Cabin," for want of heirs of John Joseph Sloan, and obtained his patent, which patent appears in the record.

The question for the decision of the circuit court, by the agreement filed, was, whether upon the death of the said John Joseph Sloan, according to the laws and statutes of Maryland, the said tract of land, called "Grassy Cabin," did not descend to the said Mary Sloan, Jesse Sloan and David Sloan, his illegitimate sister and brothers as aforesaid. The circuit court, upon the facts stated, gave judgment for the defendants, upon the ground, that the said tract of land did descend to the said Mary Sloan, Jesse Sloan and David Sloan. From which judgment, the plaintiff appealed to this court.

It is admitted in the statement of facts, that John Joseph Sloan, and his brothers and sister, the children of John and Mary Sloan, as aforesaid, were illegitimate; the marriage of the father and daughter being prohibited and made void by a law of Maryland, entitled, "an act concerning marriage," passed in 1777, ch. 12. At common law, therefore, John Joseph Sloan, and his brothers and sister, being bastards, in the eye of the law, were *nullius filius*, and incapable of inheriting as heirs, either to their putative father, or mother, or to any one else; and John Joseph Sloan, in regard to the common law, having died intestate, and without heirs of his own body, the tract of land called, "Grassy Cabin," escheated to the state of Maryland, and was properly granted by patent to the plaintiff in error.

But it is contended on the part of the defendants, that by a law of Maryland, of 1825, ch. 156, entitled, "an act relating to illegitimate children," the brothers and sister of John Joseph Sloan, who survived him, were such heirs-at-law, and relations of their deceased brother, to whom his said estate might descend; and that said estate did not, therefore, escheat to the state of Maryland.

We contend on the part of the plaintiff in error, that the circuit court committed an error in this; that upon the statement of facts and the laws of the state of Maryland, the judgment of the circuit court ought to have been given for the plaintiff, and not for the defendants: 1. Because the plaintiff's patent for his land, issued by the legal authorities of the state of Maryland is good, and that he had, therefore, a right to recover his title in the circuit court; the said John Joseph Sloan having died intestate, without issue, or heirs or relations that could inherit. 2. Because, notwithstanding, by the letter of said law, there is but one category of illegitimate children; it was never intended to extend to children of incest; and more especially, to children of incest from father and daughter. 3. Because the law of 1825, ch. 156, from its letter and terms, is morally and legally impossible to be executed with any reasonable certainty; and cannot be executed in any of its parts, if the whole *ought not to be received, in consequence of the absurdities to which it leads. 4. Because the proviso of the law [*182 is repugnant to, and contradicts its purview, or first providing clause, and renders the whole null and void. 5. Because it was not the intention of the legislature to embrace any illegitimate children, but those who could be legitimated by marriage and acknowledgment of the parents.

With regard to the first and second points, it is not necessary to proceed with an extended argument, because the correctness of the position contained

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in them depends upon the other points stated, and more especially, perhaps, on the fifth.

In regard to the third, it is proper to observe, that the act of 1825, ch. 156, has never received any construction by the Maryland courts; and is, therefore, open for the judgment of this court, and must now be finally settled by it. As it stands upon the statute book, with all its latitudinous letter, it is *sui generis*. Though of an exceedingly general and comprehensive character, it occupies but a small space in print. At a first glance, it appears to be sensible enough, as the offspring of a grave legislative body. But when we approach it with sedate and sober inquiry, to ascertain its meaning and bearing, and the great design of the Maryland lawgivers of 1825; it may be termed, not inaptly, monomaniac; without great caution, in bringing to our aid the most rigid rules of construction, it will carry Maryland back, without the intention of her legislature, to the most dark and uncivilized ages of antiquity. It is no well-inspired oracle, but rather a rickety bantling of the law, that ought not to thrive in the nursery of judicature.

To enable us the more clearly and successfully to present our objections to this act, we will present to the court the incontrovertible law-maxim settled by Lord COKE, and his associates, in *Dr. Bonham's Case*, in 8 Co. 118. It was in that case settled, that when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void. In discussing this maxim, so sound and pregnant with good sense, we shall apply it by analogy to the act under consideration. This maxim, if applicable to the act in question, will not only be entitled to great reverence and respect, but will be received as proper law, to overthrow and altogether reject the act of 1825. All legislative enactments which change and restrain the common law, shall be taken *stricti juris* (19 Vin. Abr. 524, § 125); and this rule will be claimed as settled, both in regard to our objections to the act *in limine*, which are intended to overthrow and reject it; and in discussing its merits, when looking for the meaning and intention of the legislature.

The original design of the first move of the Maryland legislature of the session of 1825, appears to have been to provide, that from *and after
*183] the passage of the act, the illegitimate children of any female should be able and capable in law to take and inherit both real and personal estate from their mother, or from each other, derived from their mother, in like manner as if born in lawful wedlock. This, with proper guards and limitations, would have been sensible and right enough; and the only mischief to result from it, would be to indirectly encourage the illicit commerce of the sexes. But it more accords with natural justice, that the illegitimate children of any female, within proper limits, should inherit her estate, rather than her brothers and sisters and other collaterals. But how utterly thoughtless and careless, even in this, the legislature has been! Suppose, such female should have illegitimate children by one man, and afterwards marry another, and have children in lawful wedlock, and dies seised of real and personal estate, how shall such estate descend? To the illicit brood exclusively? or to both illicit and marriage children? Suppose, such female should have illegitimate children by one man, and afterwards marry another, and have lawful children; and afterwards break away from her husband, to

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whom she was affianced, which often happens, and have children in adultery, and finally, she dies intestate, leaving real and personal estate: how will such estate descend? To the first illicit brood, the second set in marriage, or the third in adultery? or will it descend equally among all? Suppose, further, that such female should have illegitimate children by a negro, which we know often happens in the lower ranks of life, after she has had white illegitimate children, and dies intestate, seised of real and personal estate, it is to descend equally among the blacks and whites? We have no definitions, limitation or guards in all such matters, except the proviso, so important to the purity and correctness of social intercourse in the state. And even in regard to the right of inheritance of illegitimate children from their mother, for the want of proper guards, the act in question is clearly unreasonable. And if the maxim of Lord COKE, that "an act of parliament against reason is void," is to be received in this court, the law ought to be rejected, and all claims to titles to property under this law ought to be arrested by the judgment of this court.

But the act of 1825, ch. 156, is still more unreasonable, and objections increase and thicken upon us, as our examination is in progress. From the careless manner of its enactment, the legislature has rendered itself liable to be misunderstood, and its true intention frustrated. It has, indeed, if the letter be adhered to, made a general act, to direct descents for the benefit of all illegitimate children of any female who is the *propositus* in the law, and who is to be the *stirps* whence these relations are to branch out, from fathers and mothers without marriage; and this too, embracing bastards issuing from adultery, and from incest of father and daughter, and even son and mother, if the depravity of the human heart shall ever let loose such unbridled passions; and also embracing in its *confusion, bastards, lineal and collateral, running into the same incest and adultery, and bastards of color mingled with whites, and all too in like manner as if born in lawful wedlock. But in such a state of illegitimacy, how could persons and families proceeding from such female, as the root, establish their right to inherit any estate from each other? According to the position assumed (*i. e.* if the letter be strictly adhered to), here is a general act to direct illegitimate descents; and all the issue, both lineal and collateral, in the ascending and descending lines, to endless generations, would be capable of inheriting from the "female," who is named as the *propositus* in the law, Does it require any argument to demonstrate, that such a law could not be enforced, because it would be impossible to trace such issue with anything like certainty? Yet if the law be received by this court, in the full sweep of its letter, it must stand in the statute book like all other acts to direct descents, for the benefit of all persons claiming under it. But how could be traced the ancestors of a bastard, up to a grandfather or great grandfather, grand-uncle or great grand-uncle, in the ascending line; or the reverse in the descending line, all too, in bastardy? When lineage is traced within the pale of wedlock, there is evidence and certainty to rest upon; but without that sacred union, all is incertitude and confusion. To ascertain the pedigree of an individual whose ancestors were all bastards, would be impossible. It is, therefore, impossible to execute the law, according to the letter; and it cannot be so received by judicature.

Suppose, Maryland, or any state in this Union, should pass a general

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law to direct descents of real and personal estate, out of wedlock. Could it lead to anything else but absolute confusion? But if the letter of the act of 1825, ch. 56, be adhered to, it is necessarily just such a law as that supposed; and necessarily leads to the same absurdities and unreasonable results, and is equally impossible to be executed. Can it, then, be received in one part, if the whole together is unreasonable and impossible to be executed?

4. The proviso of the law is repugnant to, and contradicts its purview or first providing clause, and renders the whole null and void. The proviso is as follows: "Provided, that nothing herein contained shall be construed to alter or change the law respecting illegitimate persons, whose parents may marry, after the birth of such persons, and who are by them acknowledged, agreeably to the seventh section of the act of assembly, passed at December session 1820, chapter 191." There is no principle better settled, than that if the proviso is directly repugnant to the purview, the proviso shall stand and operate as a repeal of the purview. 19 Vin. Abr. 522, § 105. Is this proviso, then, directly repugnant to the purview? The purview changes the law of 1820, ch. 191, § 7, in this: it allows the illegitimate child or children of any female to inherit both real and personal estate from their mother, or from each other, without marriage, or acknowledgment of the father. Whereas, the act of *1820, ch. 191, § 7, will not allow any *185] illegitimate child or children to be capable in law to inherit and transmit inheritance, without marriage and acknowledgment of the father. It is evident, therefore, that the act of 1825 intended to change, and did actually change, that of 1820, which the proviso declares shall not be altered or changed. The proviso declares that the law of 1820 shall stand firm, without change or alteration; and the act of 1825, *quoad hoc*, makes a very material change and alteration. Without such change and alteration, the law of 1825 would be wholly useless. The proviso, therefore, is clearly repugnant to the purview, and overthrows the law altogether.

The counsel for the defendant has filed his brief, in which he does not deny that the proviso is repugnant; but simply states that the proviso has nothing to do with this question. He was invited by us to discuss the proviso, but has declined it. By the fixed rules of law, we must give the act of 1825 a strict construction, as it tends to change the common law. The common law, we learned in our early studies, is the perfection of reason, and is always jealous of its own importance; and requires every statute which invades its authority to be carefully watched and strictly construed. How, then, by strict construction, can this proviso be otherwise than repugnant? Will the court be disposed to keep strictly to the letter in the purview, and depart from it in the proviso? The proviso strangled the act of 1825, and it fell stillborn from the hands of the law-makers, before it saw the light, to annoy and disturb the good order and purity of social intercourse. For, with the entire latitudinous results to which it leads, if unrestrained by judicial powers, it will be "a horrid monster, huge, shapeless and deprived of sight." Conceived in ignorance, and "brought forth by presumption;" or rather, perhaps, from carelessness more than ignorance. Will the court depart from the rule, and give the act of 1825 a liberal construction, instead of holding it *stricti juris*? Will it apply the proviso to something beyond its letter, to bring it into harmony with the

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purview, and prevent it from being repugnant, and so save the law from its own nugatory terms?

One of the maxims of Lord COKE, that in regard to a repugnant clause, was received, we presume, and acted on by this court, in the case of the *United States v. Cantrill*, 4 Cranch 167. That case was certified from the circuit court of the district of Georgia, and arose under the act of congress of the 27th June 1798, made to punish frauds committed on the first Bank of the United States. Cantrill was indicted for falsely and feloniously uttering and publishing, as a true bank-bill of the United States, with intent to defraud one William Gibson, a certain false, forged and counterfeit paper, partly written and partly printed, purporting to be a bank bill of the United States, for ten dollars, signed by Thomas Willing, *president, and G. Simpson, cashier Upon a verdict of guilty, a motion was made [*186 in arrest of judgment, and reasons filed, one of which was, "Because the act of congress, passed 27th June 1798, entitled, 'an act to punish frauds committed on the Bank of the United States,' under which the prisoner is indicted, or so much thereof as relates to the charge set forth in the indictment, is inconsistent, repugnant, and therefore void." The act of congress, so far as it describes the offence charged against Cantrill, is in the following words: "If any person shall utter or publish as true, any false, forged or counterfeited bill or note, *issued by order of the president, directors and company of the Bank of the United States, and signed by the president, and countersigned by the cashier thereof*, with intention to defraud said corporation," etc. The question being submitted without argument, Chief Justice MARSHALL delivered the opinion of the court, that the judgment ought to be arrested, for the reasons assigned in the record. The words in italics were held to be inconsistent and repugnant, inasmuch as they made it a crime to publish as true, any false, forged or counterfeit bill or note, issued by order of the president, directors and company of the Bank of the United States, signed by the president, and countersigned by the cashier. A note issued by the order of the board, and signed by the president, and countersigned by the cashier, being genuine, could not be false and forged, and could not be falsely uttered and published, and put into circulation by Cantrill or any one else, and the law was, therefore, inconsistent and repugnant. Congress was afterwards obliged to amend the law in this respect.

5. That it was not the intention of the legislature, by the act of 1825, to embrace any bastards, except such as could be legitimated by marriage. We have examined with great care, and reflected much upon this branch of the cause. The law of 1825, and all other laws of Maryland, to which it refers, or to which it has any affinity, in regard to the commerce of the sexes, lawful or illicit, have been carefully examined, weighed and considered; and all the authorities, American and British, and of other civilized states, in the least calculated to illustrate and enlighten on this point, have been collected for the examination of the court. The result has always been the clearest conviction, that the legislature of Maryland did not, at the time of passing the act of 1825, think of or intend any illegitimate child or children, except such as could be legitimated by marriage. If any other interpretation shall be made and prevail, however well intended, it will, we hold, be a violation of the legislative will.

In the argument upon this point, we shall take the following positions.

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as true and incontrovertible. 1. That all civilized states have looked upon incest with the greatest abhorrence. 2. That no civilized state has at any time permitted illegitimate children, proceeding from incest, to inherit. 3. *187] That it will be a severe interpretation of *the act of 1825, to settle down upon Maryland a civil code, by implication, drawn out of a law having on its face evident signs of being made in a careless hour; when all other civilized states have uniformly rejected such a civil code, and when it cannot be doubted, that Maryland herself would instantly reject such a code, if openly proposed for her deliberation. Incestuous marriages have always been regarded with abhorrence by the soundest writers, and the most polished states of antiquity; and an incestuous connection between an uncle and niece has been adjudged by a great master of public law, a nuisance. 2 Kent 81; *Burgess v. Burgess*, 1 Hagg. Cons. 368. And such a connection was held in equal abomination by Justinian's Code. Code 5, 8, 2. No civilized state has at any time allowed by law, illegitimate children, proceeding from incest or adultery, to inherit. 5 Wheat. 262, note A; Civil Code of Louisiana, tit. Illegitimate Children; Napoleon Code, Illegitimate Children.

To sustain the argument upon the fifth and last point, to prove that it was not the intention of the legislature of Maryland to embrace any bastards except such who could be legitimated by marriage, we proceed to lay before the court all acts of the general assembly of that state, which may be connected with the act of 1825, by reference or affinity, in regard to the lawful or illicit commerce of the sexes. Several of them, if not all, must be taken *in pari materia*; and before we are drawn into the vortex of the letter of the act of 1825, without restriction or limitation, for the better understanding of the intention of the legislature, we will collect all her legislation on this subject, to demonstrate and establish the intention and interpretation for which the plaintiff contends.

The act of 1777, ch. 12, entitled, "an act concerning marriages," to prevent incestuous marriages, settles the degrees of kindred and affinity, and makes the marriage of John Sloan and his daughter void; and by the second section of the act, a fine of five hundred pounds is imposed upon persons who violate the law. Here, we will barely remark, that it ought not to be presumed, that the general assembly would authorize the issue of an incestuous marriage to inherit, when that issue proceeded from a connection in palpable violation of a standing law of the state.

The next law which has any affinity to that before the court, is the act to direct descents, 1786, ch. 45; and it is produced to show, that our legislature has, in more than one instance, from negligence, authorized by the letter of the law, a construction which the Maryland courts would not give; always restraining the letter by judicial power to prevent mischief. The second section of the act of 1786, ch. 45, provides how land shall descend, "first to the child or children and their descendants, if any." Now, is not "the child or children" here, as comprehensive as "illegitimate child or children," in the act of 1825? And would not the words "child or children," in the act to direct descents, *if a court would be governed by the *188] mere letter, embrace any child or children, in or out of wedlock, of incest, adultery or of amalgamation; and yet his honor the chief justice knows, that our constant exposition of the act to direct descents is, that it

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shall be confined to a child or children born in wedlock, or legitimated by marriage, according to the degrees of kindred and affinity settled by the marriage act of 1777. Again, by the seventh section of the act of 1786, to direct descents, it is enacted, "that if any man shall have one or more children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be hereby legitimated, and capable in law to inherit and transmit inheritance, as if born in lawful wedlock." Now, by the letter of this section, the marriage act is changed; and the man is at large to marry his daughter or his mother, his neighbor's wife, or his negro slave. And yet his honor the chief justice knows, that our uniform exposition has been, that the letter shall be confined to a woman according to the degrees fixed by the marriage act of 1777.

The act of 1820, ch. 191 (which is, in truth, by the reference in the proviso of the act of 1825, made part of the latter act), in its seventh section, is precisely the same as the seventh section of the act of 1786, and would, by the letter of that section, change the marriage act of 1777, and allow a man in the wide field of his lust to marry his daughter or his mother, his neighbor's wife, or his negro slave. And yet his honor the chief justice knows, that our uniform exposition has been, that the letter shall be restrained according to the degrees fixed by the marriage act of 1777. Can any one doubt, that the legislature, when it passed the law 1820, ch. 191, and copied in its seventh section the entire seventh section of the act of 1786, ch. 45, had deliberately examined and considered the seventh section of the act of 1786, ch. 45, and intended nothing more than a re-enactment of the same matter, which it was thought fit and proper to be a standing law of the state? But it may be asked, what proof have we of this? We answer, that the legislature of 1820 inserted in the seventh section of the act of that year, *verbatim et literatim*, the whole seventh section of the act of 1786. Before it was thus copied, it must have been read, examined and considered, and the contents fully known and understood, and must, therefore, have been fully in the legislative mind. Are we not all clearly satisfied of this?

Now, if the court shall conclude that the act of 1825 ought to be received by judicature for grave interpretation, let us apply the same rule and mode of reasoning, by analogy, to the acts of 1820 and 1825; and it will be clearly demonstrated, that the act of 1825 did not intend to embrace any bastards except such who could be legitimated by marriage. It appears to us clear, that, to understand fully and without any misapprehension the act of 1825, the act and the law of 1820 *must be taken *in pari materia*. For [*189 this part of the argument, and to enable us to apply it with greater force, let us again refer to the law of 1825. It is entitled, "an act relating to illegitimate children," and is as follows: "Be it enacted by the general assembly of Maryland, that from and after the passage of this act, the illegitimate child or children of any female, and the issue of any such illegitimate child or children, be and they are hereby declared to be able and capable in law to take and inherit both real and personal estate from their mother, or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock: provided, that nothing herein contained shall be construed to alter or change the law re-

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specting illegitimate persons, whose parents marry after the birth of such persons, and who are by them acknowledged, agreeably to the seventh section of the act of assembly, passed at December session 1820, chapter 191."

Notwithstanding it is evident, that this act was passed in a careless hour, without proper guards and limitations in the purview ; the proviso, although inconsistent and repugnant, will afford us a key to unlock and throw open to our minds the true meaning and intention of the legislature. To do full justice to the legislature, the act of 1825 ought to be received as an appendix to the act of 1820. The proviso proves to us beyond all doubt several important matters, to enable us to discern the real intention of the legislature. When that is once clearly discerned, the judgment of this court must, we hold, conform to it, as the only rule of construction. In the first place, the proviso informs us, by the very special and particular reference to the year, chapter and section of the act of 1820, that the committee, or persons having the matter in charge, had carefully and deliberately examined the act of 1820, and reported their proceedings to the legislative body, before the passage of the law. The question here is, what evil or grievance did the legislature discover as still existing under the act of 1820, ch. 191, § 7, which ought to be provided for and redressed? The evil and grievance discerned was evidently this, and nothing more : that by the act of 1820, ch. 191, § 7, no illegitimate child or children could be legitimated, so as to be capable in law to inherit or transmit inheritance, without marriage and acknowledgment of the father. If any woman, being seduced by the artful addresses of a man, shall have an illegitimate child or children, and die intestate, leaving real and personal estate, it is but just and honest that such estate shall descend to her own natural children, in preference to a descent to her collateral relations. When reading, deliberating on, and examining the act of 1820, ch. 191, § 7, did the legislature find any other bastards than such as could be legitimated by marriage? Is there the least shadow of reason to suppose, that any others entered at all into the mind of any member of the legislature? Nay, does not the proviso itself take us
 *190] back to the act of 1820, ch. 191, § 7, *and point out exactly the illegitimate child and children the legislature had in view? If we had been present and witnessed all the deliberations on the subject ; if we had now every member of the general assembly before us as witnesses, and they should all inform us that nothing more was intended than such children as were found named in the act of 1820, ch. 191, § 7, could it be more conclusive than the information given by the proviso? The proviso is certainly part of the law of 1825, and must be brought to our aid in the interpretation of that law. For nothing is better settled than this, that "one part of an act of parliament may expound another." 19 Vin. Abr. 527, § 149, and the references there. This is often done, even where there is no express saving in form, when it evidently leads to the true meaning of the legislature. Woe be to any court that shall consider itself in absolute control by the mere letter of this legislative enactment, evidently leading to mischief ! and when the law presents a clear presumption that the legislature intended something other than the letter. Can we believe, that children of incest, adultery and amalgamation were ever intended by the law? Take out, we

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pray, this hybridous and impure issue, or you will do great injustice to the intention to the legislature.

To further illustrate and prove that the legislature, by the act of 1825, intended to embrace only such children as could be legitimated by marriage, according to the act of 1820, ch. 191, § 7, we will now refer to several other Maryland laws, which by their affinity properly belong to the argument. And as we progress, we shall insist, that the legislature, when merely remedying a grievance still existing in the state, could not, by this enactment, sweeping as are its terms, have intended to abandon the fixed standard of purity as long erected by the sages of Maryland. And what is that standard of purity, as gathered from all her laws upon the subject? Let us pass them in review, as proposed, in order to discover it. By the act of 1777, ch. 12, a penalty of five hundred pounds is incurred by persons who shall consummate an incestuous marriage. By the act of 1715, ch. 27, § 3, every case of adultery is punished by fine. The commerce of the two races of whites and blacks has, by the laws of the state, been strictly prohibited. A free negro or mulatto, intermarrying with a white woman, becomes a slave for life. A white woman having issue by any negro or mulatto, is made a servant for seven years. White men having issue by any negress or mulatto, become servants for seven years. Free negro or mulatto women, having bastard issue by white men, are subject to the same penalty. Acts of 1715, ch. 44; 1717, ch. 13; 1728, ch. 4.

Now, can it be supposed, that the legislature, being cognisant of all these laws, and knowing the universal sentiment of the state in reference to their purity, could have intended at once to abandon them all, and provide for all the illegitimate and illicit issue that can by any *possibility [*191 be reached by the letter of the act of 1825? Bear in mind, too, that there never had been in the history of Maryland any illegitimate children under the fostering hand of the government, except such as could be legitimated by marriage. Can it be supposed, then, that the legislature intended thus at once to abandon all her former policy and purity; and make provision for all the incestuous, illicit and hybridous issues within the scope of the letter of the act of 1825? Surely, surely not!

Throughout the argument, we have held the governing rule to be, that the judges ought to interpret the law, and not to make or give law. This rule makes it the more proper that the greatest care and diligence should be used: first, in bringing to our aid the grand and leading objects of the Maryland legislature, in passing the law of 1825; and then in considering every part of that law with its reference and appendage. When putting a construction upon any statute whatever, the judges will endeavor to save the legislature from absurdity and folly; as it cannot be presumed, that men of sound minds would willingly and deliberately stultify themselves. But above all things, and most especially, will the judges endeavor to arrive at the intention of the legislature; and when that is once ascertained, readily gratify it, no matter how loose or careless may be the language in which that intention is clothed. We have endeavored to show, that any other construction than that for which we contend, would involve the legislature in folly; and further, we think we have disclosed the true, clear intention of the legislature in passing the act of 1825; both from the universal sentiment of the state, as well as all prior Maryland laws on the subject, and

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particularly that important one which the act in question expressly refers to by year, chapter and section. As a leading case upon the construction of statutes, which directs the judges to restrain the letter in order to get at the intention, we cite *Dr. Bonham's Case*, 8 Co. 118 ; 19 Vin. Abr. 514, § 84 ; 518, § 81, and the note ; 519, note ; 522, § 109, note ; 523, § 116 ; 527, § 149. Judges have power over statutes to mould them to the truest and best use. 19 Vin. Abr. 528, § 154, 158-9. When laws or statutes are made, yet there are some things which are exempted and foreprized out of the provision thereof, though not expressly mentioned. 19 Vin. Abr. 527, § 147 ; 524, § 119 ; 523, § 116 ; 514, § 27-31. Statutes which restrain the common law to be taken *stricti juris*. Ibid. 524, § 125.

Our researches, for the better understanding of the matters involved in this discussion, have informed us, that all civilized states that have deliberately formed a civil code, uniformly have prohibited the issue from incest or adultery from the right of inheritance. Shall Maryland, then, by mere implication, and a forced construction of a single act of her legislature, evidently made for another *purpose, have a civil code fixed upon *192] her, that her people have ever abhorred ; and which, if proposed openly, would be instantly rejected by her legislature ? Such an important code as that, dissenting from all civilized usage, ought never to be fastened upon any modern state. We have endeavored to maintain, that it is not the civil code of Maryland, and that it never will be, with the consent of her people ; and now, as one of her citizens, we enter our protest against such a presumption.

A printed brief has been filed in court, by the counsel for the defendant. But it mistakes our position. It supposes, that the plaintiff desires the court to punish the incestuous issue of John and Mary Sloan ; and contends, that the plaintiff is endeavoring to make such issue something more than illegitimate. This is not that for which the plaintiff contends. The purity of the law, which always extends less favor to illegitimate children than to legitimate, was not intended to punish the innocent, but to prevent the illicit commerce of the sexes. The illegitimate children from the incest in this cause, are, it is true, illegitimate. But they are not such as the legislature intended to embrace. We think we have demonstrated this clearly and successfully to the court. If they were not intended to be embraced by the legislature, this court cannot embrace them. If so, this court would be making a law, not interpreting that before it.

Price, for the defendants in error.—John Sloan, having married his own daughter, and having had several children by her, conveyed to one of those children a tract of land, and upon the death of such grantee, the rest of the children, claiming the property by descent, conveyed the same to the defendants in error. The question is, and it is the only question in the case, whether a good title did not pass by descent from the grantee of John Sloan to his brothers and sisters ? The act of 1825, ch. 156 (of Maryland), provides, “that the illegitimate child or children of any female, and the issue of any such illegitimate child or children, be and they are hereby declared to be able and capable, in law, to take and inherit both real and personal estate from their mother, or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful

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wedlock." Then follows a proviso, which has no application to the present question.

If this were the case of legitimate children, their right by descent would not, as it could not, be questioned. But the act provides that illegitimate children shall inherit "in the same manner as if born in lawful wedlock." There is no distinction, therefore, in this connection, between legitimate and illegitimate children; they all take alike. It is admitted, that these children are illegitimate, and in that respect are within the letter of the law; but it is insisted, that they *are something more than illegitimate, being the fruits of an incestuous commerce between the father and daughter, and for that reason not within the intention of the law-makers. It is supposed, that the court will feel itself called upon to show its disapprobation of the incest of the parents, by withholding from their unoffending offspring, property, to which, in other respects, they have a good title. The law, however, declares that the sins of the parents shall not be visited upon the children. And is this forbidden by any canon of the moral code? On the contrary, is it not wise and just, to enable the children to rise above the degrading accidents of their birth, by placing within their reach every means of improvement, and every incitement to a virtuous and exemplary life?

But if they are to be marked and degraded as victims, why not carry it out fully and effectually? Why permit them to vote at the elections? or to hold any office? or to marry into honest families? or to hold property by purchase? It is conceived to be necessary to punish incest. And how is it proposed that this shall be done? It is, by suffering the guilty to escape, and by seizing the innocent, and making them bear the penalty. The parents were permitted to hold and enjoy this property all their lives; and, after their death, the law is to step in and take it away from the children, as an example to the parents.

But why speak of punishing incest? It is no crime. These parents were permitted to live in open incest, because there was no law to punish them. We feel it to be immoral and highly revolting; but, in reference to the criminal law, it is an act perfectly innocent. It is a little surprising, therefore, that the court should be called upon to visit, with condign punishment, an act which the law does not regard as calling for penalty or punishment of any kind.

Mayer, for the plaintiff in error.—The decision here depends on the construction of the law of Maryland (1825, ch. 156) which enacts, "That the illegitimate child or children of any female, and the issue of such child or children, shall be able and capable in law to take and inherit both real and personal estate from their mother, or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock: provided, that nothing in this act contained shall be construed to alter or change the law respecting illegitimate persons whose parents marry, after the birth of such persons, and who are by them acknowledged, agreeably to the seventh section of the act of assembly, passed at December session, 1820, chapter 191.

The defendants claim under the title of one of an incestuous issue; and upon the ground, that one of that issue may inherit from another, under

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the law just quoted. The act of 1820, ch. 191, § 7, referred to in the proviso of that just recited, declares, that "if any man shall have a child or children *194] by any woman whom he shall afterwards *marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage, be hereby legitimated, and capable in law to inherit and transmit inheritance, as if born in wedlock."

A marriage was had between the parents of the incestuous offspring ; and it is contended by the plaintiff, that so far as they were born before the marriage, they must seek for legitimation under the act of 1820, ch. 191, § 7 ; and if born after the marriage, they must rely on the marriage as their sanction, if they are to have any legitimate standing. This latter provision of the Maryland law, and the cited act of 1825, ch. 156, must be taken together in construction ; and we maintain, that the whole enactment meant to provide for those whom it was possible for the marriage ceremony to have made legitimate, and that when the ceremony has in fact been performed, and yet can in law have no effect, the offspring are not within the contemplation of the act of 1825, ch. 156 ; the just deduction from the entire legislation being, that those were regarded who needed only the lawful union of their parents to make them legitimate, and that legitimacy in this legislation is thus to be contradistinguished to illegitimacy. As a part of the series of enactment, there should also be considered the Maryland act of 1777, ch. 12, § 1, which contains penal prohibitions of marriages within certain degrees. If this interpretation be sound, the offspring in question could not be within the benefit of the act of 1825, ch. 156, the marriage to which they must appeal being unavailing, and no lawful union (the possibility contemplated by the act) being practicable between their parents. For if we are to characterize the issue, we must look to the putative and admitted parents, and to the particular case ; and seeing the relations of the parties themselves, we must find that they could not come within the condition of "lawful wedlock," in the view of the act. They never could have been born in "lawful wedlock."

Whatever may be our sympathies in such instances, we are constrained to look at pretensions through the stern medium of the common-law policy, disqualifying as it is against the issue of illicit alliances. It makes no provision itself for such offspring by its policy, whatever may be the duty of the parents, who are, therefore, left free to make retribution to them for the dishonor of their birth. All statutes like that under consideration, interpreted, as they must be, in reference to the strict general policy which pervades our common law, are to be limited to the instances clearly within them, and are to be construed in obedience to the common-law principles, so far as those are not unequivocally superseded by the statute enactment. This view enforces the interpretation we would assign to the act of 1825, ch. 156. In the particular case, too, before the court, not only does the interpretation contended for subserve the general policy of the common law, in its repugnance to illicit connections, but it is demanded by the special odium in which it denounces such alliances as that which is the revolting feature of this case ; and against which Maryland legislation has so *195] emphatically *and studiously guarded the social morals by the act of 1777, ch. 12. All such unions and their results seem to be peculiarly offensive to our common law ; and particularly when of the infamous order

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of that which this case presents. The offspring of incest are not admissible within the general denomination of mere illegitimate issue, and should be specially designated to entitle them to enjoy the advantages of any particular legislation. 2 Kent's Com. 72-2.

However general, then, the terms of a law may be, in favor of illegitimate issue, it is reasonable to require, in conformity with the feeling the law entertains towards incest, that the common law, regarding marriage as the only test of legitimation, should exclude incestuous offspring from ordinary illegitimacy, and require them to be specifically designated. There are many cases where general terms, which might embrace certain objects, are limited in import by reference to paramount principles or institutes of the common law, which are allowed to be invaded only by express terms. The aversion of the common law may, in its bearing on the exposition of a statute, as to illegitimates, be regarded as akin to those *jura naturæ* which are termed even *leges legum*. Hob. 87. Indeed, the common law (2 Kent's Com. 72; Vaugh. 206; 2 Vent. 9) pronounces incestuous marriages to be against the law of nature. There are a number of instances, as marked as that now contended for by us, of a restricted construction of general words in a statute, in due respect to a policy, or to certain deeply seated principles of the common law. 6 Bac. Abr. Statute, 381-7; 1 Brock. 162.

But however we may admit that the offspring of incest may, under this act of 1825, be recognised, in point of parentage, as to the mother, and may inherit her estate from her or from one another, is collateral inheritance, as here claimed, allowed under it? The act declares that the illegitimate children of any female may "inherit" real estate from her and from each other. The term "inherit" has a technical meaning, and has regard to the principles which at common law regulate the derivation of estates by descent. The descent from brother to brother is immediate, but still parents must be found who shall be the actual or assumed fountain of inheritable blood, and create the kindred of brothers. 2 Bl. Com. 226-8. This act of 1825 contravenes the common law in its maxim that an illegitimate child is *nullius filius* only so far as its express provisions go; and the utmost that can be said as to the parentage with which it endows the offspring, is, that it gives them a mother. It gives them no father, and does not constitute between the children the relation of brothers and sisters. In *Stevenson v. Sullivant*, 2 Wheat. 207, the terms of the Virginia act came into question, which allows illegitimate children to inherit from the mother, and "transmit inheritance" on part of the mother. The court determined that descent was not permitted by the act from brother to brother, not only because the words "on part of the mother" confined the taking by inheritance through the mother, in the ascending or descending line; *but also, because, although the bastards, as the court says, "are, in these respects, *quasi* legitimate, they are, nevertheless, in all others, bastards, and as such they have and can have neither father, brothers nor sisters." The court also says, that in the construction of the act, "it is never to be lost sight of, that the appellants are to be considered as bastards, liable to all the disabilities to which the common law subjects them, as such, except those from which the section itself excepts them; thus indicating that the strict maxims of the common law are to be adhered to, and the privileges of bastards narrowed in reference to them in the construction of these en-

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franchising acts." Now, the terms in the Virginia act, which allow the children to transmit inheritance, would, in case of legitimate issue, cover the descent from brother to brother; and yet, even apart from the restrictive words, "on part of the mother," the court regards this transmitting power to the children as not instituting collateral descent, or in other words, as not, *ex vi terminorum*, creating the constructive relation of brothers and sisters, without express words in the act giving a perfect parentage constructively to the children. The Virginia act, as explicitly as the Maryland, conferred a mother on the children; and in giving the children the capacity to "transmit inheritance," the Virginia act yields all that the Maryland act grants, in declaring that the children may inherit from each other; for certainly a collateral descent is a transmission of inheritance. So the case of *Stevenson v. Sullivant* treats it, when showing that, even not regarding the terms "on part of the mother," there could be no descent in the case from brother to brother, although the children were endued with the capacity of transmitting inheritance. According, then, to that decision of this court, there can be no inheritance here between brother and brother, under the Maryland act of 1825; and for the reason there stated, that, although a mother is recognised by the Virginia act, as in the Maryland, yet the children had, in contemplation of law, no brothers nor sisters. According to the decision, even without the words "on part of the mother," being connected with the transmitting of inheritance by the children, their capacity to inherit would be limited to the estate of the mother. In every case of a descent from brother to brother, although it is immediate, there must be fathers to whom the kindred may be traced, although they be not named in deriving the estate, which is the subject of the collateral descent. 2 Bl. Com. 226. The paternity is the essential clue to learn the kindred, whether it be of the whole or half blood: and the primary element in this ascertainment is wanting, where no father to either party is to be found, and when the law itself declares that there is none. The relation of whole and of half-blood depends, in the derivation of descent, on the question of community of father and of mother, unless when the estate comes from the mother. Such is the necessary rule from the theory of *feudum novum ut antiquum*.

Thus it is not sufficient here to say, that by the law of Maryland the half-blood may inherit among brothers and sisters, for we have *seen, [197] that an ascertained paternity is essential to determine the relation of whole or half-blood among brothers and sisters. The law of Maryland gives the right to the half-blood only where it is ascertained that there is no brother or sister of the whole blood; a provision which looks to the possible existence, at least, of fathers. Where the law itself, in the confessed circumstances, leaves an utter blank for the father, and declares it a legal impossibility that there should be one, we may at least say, that the statute of descent, which pre-supposes a necessary ascertainment of a father, does not comprehend a case where the law declares itself that there can be none, and can be no such ascertainment. The case, then, of such collateral succession between illegitimates must be regarded as a *casus omissus* from our Maryland law of descents (see the Act of Descents, 1820, ch. 191), and the common law must regulate as in another case of *casus omissus*, as the same was done in *Barnitz v. Casey*, 7 Cranch 456.

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There could, then, be no inheritance of the half-blood between these illegitimates; even assuming that the tests are erroneous, which an effort has been made to show are those exclusively applicable.

The result of these views, which conform to the well-established principles of the common law, unimpaired by the act under consideration, is, that the act allows the illegitimate issue to inherit from their mother, and to inherit from each other estate derived from the mother, but not estates of purchase, as is the character of the estate in question in this cause. Our exposition gives effect to every provision of the act, according an inheritance collateral as well as lineal; but modifying the scope of the act by rules of the common law, which must govern and limit the innovation introduced: unless those rules be, by the terms of the new legislation, expressly, or by necessary implication, superseded; an implication so clear and irresistible, that no construction of the law is possible, consistently with the operation of those rules.

TANEY, Ch. J., delivered the opinion of the court.—This case depends upon the construction of the act of assembly of Maryland, passed at December session 1825, ch. 156, entitled, “an act relating to illegitimate children.” By this act of assembly, “the illegitimate child or children of any female, and the issue of any such child or children,” are declared to be capable in law “to take and inherit both real and personal estate from their mother, or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock.”

It appears from the record, that a man by the name of John Sloan had several children, who were the issue of an incestuous connection of a shocking character. He conveyed a tract of land, called “Grassy Cabin,” situated in Allegany county, in the state of Maryland, to John Joseph Sloan, one of these children. John Joseph Sloan, the grantee, died about the year 1832, intestate, and without issue; and seised in fee-simple of this land. Two brothers and one sister, the *issue of the same incestuous intercourse, survived him; and they conveyed the land to Jacob Blougher and Daniel [*198 Blougher, the defendants in error. The plaintiff in error, after the death of John Joseph Sloan, took out an escheat warrant for the above-mentioned tract of land, upon the ground, that there could be no lawful heirs of the said Sloan; and having obtained a patent for the said land, he brought an ejectment for it, in the circuit court of the United States for the district of Maryland; and the judgment of that court being against him, the case has been brought here by a writ of error.

There is no controversy about the facts in the case. It was tried in the circuit court upon a case stated; and has been elaborately argued here, and many authorities cited to show that the court, in construing a statute, may restrict the literal meaning of the words used, in order to effectuate the intention of the legislature. The plaintiff in error contends, that in passing the act of assembly above mentioned, the legislature never contemplated a case like the present; and never intended to give the right of inheritance to the children of an intercourse so deeply criminal. It is, undoubtedly, the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are

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satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it. In the case before us, the words are general, and include all persons who come within the description of illegitimate children. According to the principles of the common law, an illegitimate child is *filius nullius*, and can have no father known to the law. And when the legislature speak, in general terms, of children of that description, without making any exceptions, we are bound to suppose they design to include the whole class. And, as illegitimate children, in a question as to the inheritance or distribution of property, can have no father whom the law will acknowledge as such ; how, can we, in a controversy like this, inquire who was the father of these children, in order to determine upon their right to the property ?

The expediency and moral tendency of this new law of inheritance, is a question for the legislature of Maryland, and not for this court. It seems to have been supposed by the legislature, that as there could be no doubt of the relation which the mother bears towards her illegitimate children, the reasons of policy which must always preclude such children from claiming the inheritance of any one, upon the ground, that he was their father, do not apply to the property of the mother, or the property of each other. To this extent, therefore, the right to inherit is given by this act of assembly. And it would appear to have been given upon the principle, that it is unjust to punish the offspring for the crime of the parents. The right of the children, therefore, is not made to depend upon the degree of guilt of which *199] they were the offspring. All illegitimate *children are the fruits of crime ; differing indeed, greatly, in its degree of enormity. And the legislature, if it had seen proper to do so, might, undoubtedly, have made the right to the inheritance to depend upon the character of the offence committed by the parents. But they have used no language showing any such design. On the contrary, they appear to have looked at the unoffending character of the children, rather than at the criminal conduct of the parents, of whom they were the offspring.

It has been said, that the expressions in the enacting clause of this act of assembly, which declares that the illegitimate children spoken of shall be capable of inheriting from their mother and from each other, "in like manner as if born in lawful wedlock," imply, that those children only were intended to be provided for, whose parents were capable of contracting a lawful marriage with each other. The same argument has also been urged, upon the proviso, which declares, that nothing in the law shall be construed "to change the law respecting illegitimate persons whose parents marry after the birth of such persons, and who are by them acknowledged, agreeably to the seventh section of the act of assembly, passed at December session 1820, ch. 191 "

We do not perceive the force of this argument. It is admitted, that the act of assembly, now in question, must be taken in connection with the previous laws of Maryland regulating the descent of real estate, and the distribution of personal property ; for this law forms a part of the entire system of legislation on these subjects. But the expressions referred to in the enacting clause, so far from implying that the parents may marry, presupposes that they never will marry ; and provides for the children on that account. The expressions are evidently used merely to denote the shares

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and proportions in which such children are to take ; and the reference for the rule is made to children born in wedlock, in order to save the necessity of introducing into this law a table of descents as to real property, and of distribution as to personal.

In relation to the proviso, it is proper to remark, that the rights of primogeniture were abolished in Maryland, by the act of 1786, ch. 45. There was a provision in this law declaring that illegitimate children, whose parents afterwards married, and acknowledged them, should be thereby legitimated, and made capable of taking and inheriting property as if born in lawful wedlock. The act of 1820 embodied the original act as to direct descents, with its various supplements, into one law ; and provided for some laws of descents which had before been omitted. This act of assembly, of course, contained the clause in favor of illegitimate children whose parents should afterwards marry, which had been introduced into the act of 1786, and which had always been the law of the state, from the time that act went into operation. And the proviso in the act of assembly now in question, was introduced, manifestly, from the apprehension that the general expressions of the enacting clause of the law might be held to reach those whose parents afterwards *married, and deprive them of the greater rights [*200 of inheritance which belonged to them under the previous acts of assembly. The proviso, like the expressions in the enacting clause, shows that the legislature were not looking to children whose parents would probably marry, but to children whose parents never would marry ; and they make no distinction between the issue of those who could not, and of those who would not, become lawfully joined in wedlock. If, from any cause whatever, the parents were never married, the children were illegitimate ; and all illegitimate children, under this act of assembly, may inherit from their mother and from each other. It follows, that the tract of land called "Grassy Cabin," upon the death of John Joseph Sloan, descended to his brothers and sister before mentioned ; and the plaintiff is not entitled to recover. The judgment of the circuit court is, therefore, affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel : On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*SAMUEL SPRIGG, Appellant, v. The BANK OF MOUNT PLEASANT,
Appellee.

Principal and surety.—Parol evidence.

The principles decided in the case of Sprigg v. Bank of Mount Pleasant, 10 Pet. 257, examined and affirmed.

It is equally well settled in courts of equity, as well as in courts of law, as a rule of evidence, that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement; and this is founded, on the soundest principles of reason and policy, as well as authority. Hunt v. Rousmanier, 8 Wheat. 211, cited.

Extending the time of payment of a bond, and a mere delay in enforcing it, will not discharge a surety; unless some agreement has been made injurious to the interest of the surety.

It is a sound and well-settled principle of law, that sureties are not to be made liable beyond their contract, and any agreement with the creditor, which varies essentially the terms of the contract, without the assent of the surety, will discharge him from responsibility; but this principle cannot apply, where the surety has, by his own act, exchanged his character of surety, for that of principal; and then applies to a court of equity to reinstate him to his character of surety, in violation of his own express contract.

Courts of equity will permit independent agreements which go to show a deed, on its face absolute, was intended only as a mortgage, to be set up against the express terms of the deed, only on the ground of fraud; considering it a fraudulent attempt in the mortgagee, contrary to his own express agreement, to convert a mortgage into an absolute deed; and it is equally a fraud on the part of a debtor, to attempt to convert his contract as principal, into that of a surety only.

APPEAL from the Circuit Court of Ohio. This case was brought before the court, at January term 1836, on a writ of error, prosecuted by the present appellant, seeking to reverse the judgment of the circuit court in an action instituted against him on a joint and several bond, under seal, made by him and others, to the Bank of Mount Pleasant, for the payment of a sum of money stated in the bond, to the bank, upon which obligation the bank had loaned the sum of \$2100, and had paid the same to Peter Yarnall & Company, one of the co-joint and several obligors. The bank, after the loan, had continued to renew it for some years; the discount and interest on the same having been paid to the bank every sixty days; until, when Peter Yarnall & Company having become insolvent, suit was brought on the obligation, against Samuel Sprigg, and a judgment obtained against him for the amount of the obligation.

The object of the writ of error was to have the judgment of the circuit court reversed, on the ground that the indulgence for the payment of the debt had been given to Peter Yarnall & Company, without the privity or knowledge of the plaintiff in error; that he was only a surety in the obligation, which was, he alleged, known to the bank; and he was discharged from the liability *for the debt to the bank. These allegations were *202] denied by the Bank of Mount Pleasant. The court in that case held that all were principals in the obligation, and were equally and fully bound to the payment of the debt; and the continuation of the loan on the bond, whether the same was to one or all the obligors did not impair the claim of the bank to recover from all and each of them. The judgment of the circuit court of Ohio was affirmed. (10 Pet. 257.)

In December 1838, the appellant in this case, Samuel Sprigg, filed a bill in the circuit court of Ohio, praying to have the judgment which had been affirmed in the supreme court, perpetually enjoined; on the ground, that all the parties to the bond held by the bank, except Peter Yarnall & Com-

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pany, were sureties for the loan made on the bond ; and that the bank, on the maturity of the bond, having re-discounted it, from time to time, at the request of Yarnall & Company, without the consent of the sureties, they, the complainant being one, were discharged. The circuit court, after the testimony of many witnesses had been taken, and a full hearing, refused the injunction ; and ordered the bill to be dismissed ; and from that decree the complainant prosecuted this appeal.

The counsel for the *appellant* contended, that his case was made out as stated in the bill, and referred the court to the depositions, and particularly to the letters of Yarnall to the bank, and the account of the bank with Yarnall & Company, taken from the bank books. He contended, that there was no estoppel in equity, especially as a rule of evidence, though there may be some cases in its popular sense, as a broad rule of right. He contended, that though the sureties made themselves principals to pay in sixty days, yet they were not principals without their consent, so long as the bank might choose to renew the loan. He contended, that if he had made a case which would entitle him to relief, supposing the words "as principals" were not in the obligation, that then he was entitled to the relief sought, notwithstanding the insertion of these words, "as principals." He contended, that the existence of the words "as principals," in the bond, did not deprive him of that equity which the like conduct of the bank would give him in the common case of a joint and several obligation. The plaintiff also contended, that to so give time and enter into new agreements, without the surety's assent, was, though none might have been intended, a fraud upon him, notwithstanding the insertion of the words "as principals," when the bank knew that the discount was for the sole benefit of Yarnall & Company. He further insisted, that the insertion of the words "as principals," when the bank knew the true relations of the parties, did not give the bank the right to renew the loan, to make new agreements, or to give further day of payment, at its pleasure, without the assent of the sureties. That if the defendants intended to gain such a *power or advantage, fair-dealing required [203 them to ask or demand it from the sureties, in a plain way, as by a direct insertion of such a power in the obligation : a practice which this same bank has long since adopted. And that the decree of the court below ought to be reversed, and one entered, perpetuating the injunction, with costs.

The counsel for the *appellee* contended, that the appellant, having acknowledged himself in the bond to be a principal debtor, was estopped from alleging that he was only a surety, as between him and the appellee. Also, that the testimony excepted to was entirely inadmissible, so far as it was sought by the same to contradict, &c., the bond ; there being no allegation in the bill, nor proof, that there was any fraud, surprise or mistake, in the making or executing the same. Also, that the appellant, upon his own showing, admitting all in his bill stated to be true, was not entitled to the relief prayed for. And that, as the appellant was accustomed to transact business with the bank, and as the payment of the bond was deferred according to its usages, he was bound by those usages ; such usages, under the circumstances, forming a part of the bond or contract. Also, that the appellant had legally and equitably waived all his right as surety, if he were such, by

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acknowledging himself to be a principal debtor, and so contracting with the bank; and had thereby at least authorized the bank to treat him according to the character voluntarily assumed by him, until such time as he might give notice that he was but a surety, and require the bank to prosecute the collection of the bond. And that the court ought not to permit the appellant to disclaim the character of a principal debtor, and thereby violate his contract and good faith, and thus perpetrate a fraud upon the appellee. And that the appellant had failed, even if the testimony was admissible, to sustain by proof the material allegations of his bill. The appellee also contended, that the bank was entitled to a decree, and that decree should include, if the injunction in this case were dissolved, damages, according to the statutes of Ohio, which might be recognised as rules, &c., by this court; and which require the courts of that state, on the dissolution of an injunction to stay the collection of money, to render a decree for ten per cent. damages on the amount due, in favor of the defendants: and if an appeal should be taken to a superior court, and the injunction there dissolved, that court is required to render a decree for fifteen per cent. damages.

The case was submitted to the court, on printed arguments, by *Jacob and Webster*, for the appellant; and by *Alexander*, for the appellee.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up on appeal from the circuit court of the United States for the district of *204] Ohio. The appellant filed his bill on the *equity side of the court for an injunction, to enjoin all further proceedings on a judgment recovered against him by the appellees, on the law side of the court. The judgment was founded upon the same single bill now in question, and is as follows:

"\$2100. Know all men, by these presents, we, Peter Yarnall & Co., Samuel Sprigg, Richard Simms, Alexander Mitchell and Z. Jacobs, as principals, are jointly and severally held and firmly bound to the president, directors and company of the Bank of Mount Pleasant, for the use of the Bank of Mount Pleasant, in the just and full sum of twenty-one hundred dollars, lawful money of the United States, to the payment of which said sum, well and truly to be made, to the said president, directors and company, for the use aforesaid, within sixty days from the date hereof, we jointly and severally bind ourselves, our heirs, &c., firmly by these presents. Signed with our hands and sealed with our seals, this twentieth day of February, A. D. 1826.

PETER YARNALL & Co.,	[Seal.]
SAM. SPRIGG,	[Seal.]
RICH'D SIMMS,	[Seal.]
ALEX. MITCHELL,	[Seal.]
Z. JACOBS,"	[Seal.]

"Signed and delivered in presence of—

The judgment at law came before this court on a writ of error, and is reported in 10 Pet. 257. There were in that case various pleas interposed, setting forth, substantially, that this bill was executed by the obligors, to be discounted at the bank; and that the defendant, Samuel Sprigg, was surety

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only for Peter Yarnall & Company, who had executed the bill with him ; and that the bank had, by renewing or continuing the discount, after the time first limited for the payment of the same, discharged the sureties. The pleadings in the suit were very voluminous, and terminated in demurrers. The judgment of the circuit court was affirmed in this court ; and the decision turned upon the point, that the defendant and all the other obligors had, by the express terms of the obligation, bound themselves as principals, and were thereby estopped from setting themselves up as sureties for Yarnall & Company, and claiming to be discharged by reason of the extended credit given to Yarnall & Company : and the present bill was filed on the equity side of the court, relying substantially on the same ground, for relief against that judgment.

The bill states that Peter Yarnall and Samuel Mitchell were doing business as partners, under the firm of Peter Yarnall & Company ; and that the appellees were a banking company, doing business as a bank, in the town of Mount Pleasant. That about the 20th of February, in the year 1826, the said Peter Yarnall & Company borrowed from the bank \$2100, and the single bill now in question was executed, and discounted at the bank, in the usual course *of business. That at the time of the loan, the bank knew that Peter Yarnall & Company were the principals, and so [*205 received, and accepted, and treated them ; and that the other obligors were their sureties, notwithstanding the form of the obligation. That when the said obligation became due, to wit, on the 21st of April 1826, the bank, on receiving \$22.40, paid by Peter Yarnall & Company, for the discount for sixty days, without the knowledge or consent of the sureties, gave a further credit and time of payment for sixty days. That the bank, at each consecutive day of discount, and payment of interest in advance, extended the payment of said bill, in like manner, until September or October 1828 ; until after the failure and insolvency of the said Peter Yarnall & Company, which happened about that time. That between the time the said obligation first became due, and the day when Yarnall & Company failed, the bank, or the said appellant and his co-sureties, could have collected and realized the money secured by the said obligation. And that if the bank had not renewed said loan, and given new and further time of payment, the obligation could have been collected from the said Peter Yarnall & Company. And the bill then charges, that the bank, contriving and intending to impose upon the appellant a loss which has occurred to them in consequence of a confidence and bargain made by themselves with the said Yarnall & Company, and in fraud of the said appellant and his co-sureties ; if at the time of bestowing such confidence and making such bargains, it was intended to hold the appellant and his co-sureties liable, and more particularly in fraud of the appellant and his co-sureties, if such confidence and contract with the said Yarnall & Company was, at the time of making the same, a mere personal confidence and contract with the said Yarnall & Company. The bill then sets out the proceedings at law, upon which a judgment has been recovered ; and prays a perpetual injunction against further proceedings upon the judgment and execution.

The bank, in their answer, admit the discount of the single bill ; and allege that it was so discounted at the request of the obligors, and the proceeds paid to Alexander Mitchel, one of the obligors. They positively deny

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having any knowledge of any transaction in relation to said obligation, until it was presented to them for discount; or that they had any knowledge of the relation in which said obligors stood to one another; or that they knew that the proceeds of the obligation was obtained for the exclusive benefit of the said Peter Yarnall & Company; or that they were the principal debtors in said obligation. They deny that they received, accepted and treated them as the principal debtors; and they aver that the appellant and all the other obligors were principal debtors, and so contracted with and bound themselves to the bank; as will appear by reference to the said single bill. And they further aver, that it was on the faith of this agreement alone, that they discounted the obligation; and that, had not the obligors contracted and bound themselves as principals, let the relations *among *206] themselves be what it might, they would not have discounted the single bill; and that this agreement was made with full knowledge and fair understanding of the fact, and of the purport of the provision in said obligation. And they aver, that the appellant, having bound himself as a principal debtor to the defendants, he is estopped from now alleging that he is only a surety. They deny that they ever gave the said Yarnall & Company the further credit and time of payment as claimed in the bill, or otherwise. They admit, they used great lenity towards the obligors, in not requiring payment, promptly, when due; but aver that they did so, because they had confidence in the honesty, integrity and solvency of the obligors, and considering them all as principal debtors. They admit the proceedings at law as set forth in the bill; and deny all manner of unlawful confederacy; and claim the same benefit of this defence, as though they had demurred to the bill. To this answer, there is a general replication; and the cause having been heard upon the bill, answer, replication, exhibits and testimony; it was adjudged and decreed, that the complainant in the court below was not entitled to the relief prayed in the bill. Whereupon, the injunction which had been allowed was dissolved, and the bill dismissed.

When this case was before the court on the writ of error, the effect and operation of the words, "as principals," contained in the single bill discounted at the bank, were fully considered; and it was decided, that they operated as an estoppel, and precluded the defendants from going into evidence to show that he was only surety in the single bill. And unless it shall be found that a different principle prevails in a court of equity, the same result must follow upon the present appeal.

It is said, however, on the part of the appellant, that there are no technical estoppels in a court of equity. This may be admitted; but it will not affect the present question. For it is equally well settled, as a rule of evidence, in courts of equity as well as in courts of law, that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement. And this rule is founded on the soundest principles of reason and policy, as well as on authority. This doctrine is fully recognised by this court in the case of *Hunt v. Rousmanier*, 8 Wheat. 211. The court say, it is a general rule, that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to the written instrument; that this rule is recognised in courts of equity, as well as in courts of law. But courts of equity grant relief, in cases of fraud and mistake; which can-

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not be obtained in courts of law. In such cases, a court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention. This authority is so directly in point, that it cannot be necessary to refer to any other. But the principle will be found in accordance with the highest authority, both in this country *and in the English chancery. 1 Johns. Ch. 429; 6 Ves. 328, and note. [*207]

The bill does not charge that the words, "as principals," were inserted in the obligation by mistake, or under any misapprehension on the part of the appellant of their import and effect. But on the contrary, the bill states that the loan was made by the bank to Peter Yarnall & Company, in the usual way of making loans at that bank. From which it is fairly to be inferred, that this obligation was, in form, according to the usage of the bank; with which usage, the obligors must be presumed to have been conversant. Nor is there any direct charge of fraud on the part of the bank; but it seems to be stated, as matter of inference from the allegation, that the loan was for the sole benefit of Yarnall & Company, and that known to the bank. But whatever the charge may be, it is denied in the answer, and is entirely unsupported by the testimony. The charge of fraud rests altogether upon the allegation that the appellant was only a surety in the single bill, and that was known to the bank. All parol evidence on these points seems to have been admitted; although objected to, on the part of the bank, as inadmissible, on the ground that it contradicted the written instrument. The ruling of the court on this objection does not appear upon the record. But if the evidence was admitted, the appellant has no ground of complaint. It was his own evidence. And all that this evidence established, was the simple fact, that the appellant was only surety for Yarnall & Company. But that can have no influence against his direct admission in the obligation, that he was a principal; and there being no pretence of mistake or surprise, there can be but one meaning attached to this admission; which is, that as between the obligors and the bank, all were principals, whatever might be their relation between themselves. They had, undoubtedly, a right to waive their character and legal protection as sureties, and assume the character of principals. This admission in the obligation must have been for some purpose; and none can be reasonably assigned, except that it was intended to place all the obligors upon the same footing, with respect to their liability to the bank.

The evidence did not support the allegation that the bank had made any agreement to extend the loan or time of payment, other than continuing the discount, in the ordinary course of business at the bank. The form of the obligation dispensed with the necessity of giving any notice to the appellant, even considering him in the character of a surety; and extending the time of payment, and a mere delay in enforcing it, will not discharge a surety, unless some agreement has been made injurious to the interest of the surety; nothing of which appears to have been done in this case. 9 Wheat. 720; 12 Ibid. 554. The cashier of the bank denies that he ever made any contract with Yarnall & Company, for the extension of the payment of the obligation discounted at the bank, on the 20th of February 1826, for Peter Yarnall & Company, and others *(referring to the single bill in question), after the same became due, for sixty days, or any other period; [*208] but discounted the same according to the custom of the bank; but the time

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or indulgence given was merely at the will of the bank. That he could not make any contract for the extension of payment, according to the rules of the bank, without an order from the board of directors ; and that, on an examination of the minute-book, he found no such order ; where, if it had been made, it would appear : and the inference attempted to be drawn, that Yarnall & Company were considered and accepted by the bank as the principal debtors, because the account kept at the bank of this loan was in his name alone, was done away, and fully explained, by the testimony of the cashier, as to the custom of the bank, that the account is always kept with the first signer, unless otherwise especially authorized and directed. But, admitting that the bank knew that Yarnall & Company were the principal debtors, this would not exonerate the other obligors from their responsibility as principals, in violation of their express contract. If Yarnall & Company were of doubtful credit, it might have been the very reason why the bank required all the obligors to bind themselves as principals.

It is, no doubt, a sound and well-settled principle, that sureties are not to be made responsible beyond their contract ; and any agreement with the creditor, which varies essentially the terms of the contract, without the assent of the surety, will discharge him from his responsibility. But this principle cannot apply, where the surety has, by his own act, exchanged his character of surety for that of principal ; and then applies to a court of equity to reinstate him to his character of surety, in violation of his own express contract. This would be sanctioning a fraud upon the creditor. This case has been likened at the bar to that of a deed, absolute in its face, but which, by an independent agreement between the parties, was intended only as a mortgage. Courts of equity will permit such agreements to be set up against the express terms of the deed, only on the ground of fraud ; considering it a fraudulent attempt in the mortgagee, contrary to his own express agreement, to convert a mortgage into an absolute deed. And it is equally a fraud on the part of a debtor, to attempt to convert his contract as principal into that of surety only. No attempt has been made, in the present case, to show that the bank had made any agreement with the appellant, that he should be considered and treated as a surety only ; contrary to the express terms of his contract to be bound as a principal. If any such agreement had been shown, the analogy to the case put of a mortgage, might hold.

The allegation, that the neglect of the bank to prosecute Yarnall & Company has, by their insolvency, thrown the loss of the debt upon the sureties, might be of some weight, if any measures had been taken by them to expedite the collection of the debt from Yarnall & Company, or no longer to *209] continue the discount of the obligation. But no such measures appear to have been taken ; and their solvency must be at the risk of the sureties, who have, by their express contract, assumed the character of principals. The decree of the circuit court is accordingly affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel : On consideration whereof, it is ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*STATE OF RHODE ISLAND and PROVIDENCE PLANTATIONS, Complainant,
v. STATE OF MASSACHUSETTS, Defendant. (a)

Chancery practice and pleading.—Suits between states.

By a rule of the supreme court, the practice of the English courts of chancery is the practice in the courts of equity of the United States. In England, the party who puts in a plea, which is the subject of discussion, has the right to begin and conclude the argument; the same rule should prevail in the courts of the United States, in chancery cases.

In a case in which two sovereign states of the United States are litigating a question of boundary between them, in the supreme court of the United States, the court have decided, that the rules and practice of the court of chancery should, substantially, govern in conducting the suit to a final issue. 12 Pet. 735-9. The court, on re-examining the subject, are fully satisfied with the decision.

In a controversy where two sovereign states are contesting the boundary between them, it is the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring the case to a final hearing on its merits; it is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of chancery pleading.

In ordinary cases between individuals, the court of chancery has always exercised an equitable discretion in relation to its rules of pleading, whenever it has been found necessary to do so for the purposes of justice. In a case in which two sovereign states are contesting a question of boundary, the most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength. If a plea put in by the defendant may in any degree embarrass the complainant, in bringing out the proofs of the claim on which he relies, the case ought not to be disposed of on such an issue; undoubtedly, the defendant must have the full benefit of the defence which the plea discloses, but at the same time, the proceedings ought to be so ordered as to give the complainant a full hearing on the whole of his case.

According to the rules of pleading in the chancery courts, if the plea is unexceptionable in its form and character, the complainant must either set it down for argument, or he must reply to it, and put in issue the facts relied on in the plea; if he elects to proceed in the manner first mentioned, and sets down the plea for argument, he then admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent the recovery; if, on the other hand, he replies to the plea, and denies the truth of the facts therein stated, he admits that if the particular facts stated in the plea are true, they are then sufficient in law to bar his recovery; and if they are proved to be true, the bill must be dismissed, without a reference to the equity arising from any other facts stated in the bill.

If a plea, upon argument, is ruled to be sufficient in law to bar the recovery of the complainant, the court of chancery would, according to its uniform practice, allow him to amend, and put in issue, by a proper replication, the truth of the facts stated in the plea; but in either case, the controversy would turn altogether upon the facts stated in the plea, if the plea is permitted to stand. It is the strict and technical character of those rules of pleading, and the danger of injustice often arising from them, which has given rise to the equitable discretion always exercised by the courts of chancery in relation to pleas; in many cases, when they are not overruled, the court will not permit them to have the full effect of a plea; but will, in some cases, leave to the defendant the benefit of it, at the hearing; and in others, will order it to stand for an answer, as, in the judgment of the court, may best subserve the purposes of justice.

The state of Rhode Island, in a bill against the state of Massachusetts, for the settlement of the boundary between the states, had set forth certain facts on which she relied in support of her claim for the decision of the supreme court, that the boundary claimed by the state of Massachusetts was not the true line of division between the states, according *to their respective charters; to this bill, the state of Massachusetts put in a plea and answer; which [211] the counsel for the state of Rhode Island deemed to be insufficient. On a question, whether the plea and answer were insufficient, the court held—that as, if the court proceeded to decide the case upon the plea, it must assume, without any proof on either side, that the facts stated

(a) Mr. Justice STORY did not sit in this case.

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in the plea were correctly stated, and incorrectly set forth in the bill, then it would be deciding the case upon such an issue as would strike out the very gist of the complainant's case; and exclude the facts upon which the whole equity was founded, if the complainant had any. The court held, that it would be unjust to the complainant not to give an opportunity of being heard, according to the real state of the case between the parties; and to shut out from consideration the many facts on which he relied to maintain his suit.

It is a general rule, that a plea ought not to contain more defences than one; various facts can never be pleaded in one plea, unless they are all conducive to the single point on which the defendant means to rest his defence.

The plea of the state of Massachusetts, after setting forth various proceedings which preceded and followed the execution of certain agreements with Rhode Island, conducing to show the obligatory and conclusive effect of those agreements upon both states, as an accord and compromise of a disputed right, proceeded to aver, that Massachusetts had occupied and exercised jurisdiction and sovereignty, according to the agreement, to the present time; and then set up as a defence, that the state of Massachusetts had occupied and exercised jurisdiction over the territory from that time up to the present; the defendants then pleaded the agreements of 1710 and 1718, and unmolested possession from that time, in bar to the whole bill of the complainant. The court held, that this plea was twofold: 1. An accord and compromise of a disputed right; 2. Prescription, or an unmolested possession from the time of the agreement. These two defences are entirely distinct and separate, and depend upon different principles; here are two defences in the same plea, contrary to the established rules of pleading; the accord and compromise, and the title by prescription united in this plea, render it multifarious; and it ought to be overruled on this account.

THIS case was before the court, at January term 1838. The state of Rhode Island, in 1832, had filed a bill against the state of Massachusetts, for the settlement of the boundary between the two states; to which bill Mr. *Webster*, at January term 1834, appeared for the defendant; and on his motion, the cause was continued until the following term, when a plea and answer were filed by him, as the counsel for Massachusetts. Before January term 1837, the state of Rhode Island filed a replication to the plea and answer of the defendant; at the same time giving notice of a motion to withdraw the same. At January term 1838, the counsel for Massachusetts moved to dismiss the bill filed by the state of Rhode Island, on the ground that the court had no jurisdiction of the cause. This motion was argued by *Austin*, the Attorney-General of Massachusetts, and by *Webster*, for Massachusetts; and by *Hazard* and *Southard*, for the state of Rhode Island; and was overruled. (12 Pet. 657.)

Afterwards, at the same term, *Webster*, on behalf of the state of Massachusetts, as her attorney and counsel in court, moved for leave to withdraw the plea filed in the case on the part of Massachusetts; and also the appearance which had been entered for the state. *Hazard* moved for leave to withdraw the general replication to the plea of the defendant in bar, and *212] to amend the original bill. *The court, after argument, ordered, that if the counsel on behalf of Massachusetts should elect to withdraw the appearance before entered, leave be given for the same; and the state of Rhode Island might proceed *ex parte*. But if the appearance were not withdrawn, that then, as no testimony had been taken, the parties be allowed to withdraw or amend the pleadings under such order as the court might thereafter make. (12 Pet. 756.)

At January term 1839, *Southard*, on behalf of the state of Rhode Island, stated, that the bill filed by the state had been amended; and moved that a rule be granted on the state of Massachusetts, to answer in a short time, so that the cause might be disposed of during the term. The court, the bill

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of the state of Rhode Island having been amended the second day of the term, ordered that the state of Massachusetts should be allowed until the first Monday in August 1839, to elect whether the state would withdraw its appearance, pursuant to the leave granted at January term 1838 ; and if withdrawn within that time, the state of Rhode Island should be, thereupon, at liberty to proceed *ex parte*. If the appearance of the state of Massachusetts should not be withdrawn before the first Monday in August 1839, the state to answer the amended bill before the second day of January 1840. (13 Pet. 23.)

The amendments made by the complainants in the bill were, chiefly, the insertion, by reference to reports of the commissioners of the colony of Massachusetts, to the government of Massachusetts, while a colony, on the 13th of April 1750, and on the 21st of February 1792, to the legislature of the state of Massachusetts, appointed by an act of the commonwealth of Massachusetts, passed on the 8th day of March 1791, "for ascertaining the boundary line between this commonwealth and the state of Rhode Island."

The report of April 13th, 1750, stated, that the commissioners on the part of the colony of Massachusetts met the gentlemen appointed on behalf of the colony of Rhode Island, on the 10th of April 1750, "and spent part of that and the next succeeding day in debating on said affair with those gentlemen ;" and produced the agreement of 1710-11. "Sundry plans, &c., were offered to run and review with them the said line, but they refused to go, or join us herein, but insisted on our going with them to a certain place on Charles river, in Wrentham, from which they, a few months since, measured three miles south, and then extended a west line, with the variation west, to the west bounds of that colony, as they claim as the west bounds of that colony, as they informed us ; which bounds they claim as their north bounds ; and is about four or five miles northward from Woodward and Saffrey's station." The report also stated, "that on the return of the commissioners to the place of meeting, the Rhode Island commissioners not having accompanied the Massachusetts commissioners to the station, they found them at the original place of meeting, who desired the commissioners would adjourn to a second meeting, which was assented to, and the meeting fixed at *the same place, in October following, in case their respective governments consented thereto." [*213]

The second report was made by "The commissioners on the part of Massachusetts, to the legislature of that state, Feb. 21, 1792." It was stated to be a report "that the commissioners appointed by an act of the legislature of the commonwealth of Massachusetts, passed on the 8th day of March 1791, for ascertaining the boundary line between this commonwealth and the state of Rhode Island, have carefully attended the services assigned them, and take leave to report their doings."

The report stated, "that on the 15th of August 1791, we, by agreement, met the commissioners from the state of Rhode Island, at Wrentham, in this commonwealth, and after exchanging the powers under which we severally acted, we proceeded to discuss the subject that gave rise to our appointments, in the course of which it appeared, that the state of Rhode Island, from their construction of this expression, 'three miles south of Charles river, or of any and every part thereof,' in the ancient charter of the colony

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of Massachusetts, and as the south bounds of the same, claim near three miles north upon this commonwealth, than the present line of jurisdiction between the two governments; the commissioners of the commonwealth, from the circumstance that the branch, now called Charles river, and from which the claim of the state of Rhode Island would run three miles south, to ascertain the south boundary of the commonwealth, could not have been known by the name of Charles, at the time of granting the Massachusetts charter in 1621; and from this line being ascertained and fixed at a different place by commissioners chosen by the colonies of Massachusetts and New Plymouth in 1667, at a time when the intentions of the grantor and grantees must have been known, are convinced, that the claim of the state of Rhode Island is ill-founded; but to complete, if possible, the intentions of our appointments, and that the disputes between the governments might be amicably adjusted, we united with the commissioners of the state of Rhode Island, in the agreement as in No. 1.

"In examining and comparing the charter of the two governments, granted by the successive kings of England, under which both claim, it appears, that the first charter to the colony of Massachusetts was granted by King James the First, in 1621, and assigned a certain territory to that colony, bounded by an east and west line, which was to be three miles south of Charles river, or of any and every part thereof; the same expression is also used for limiting a part of the bounds of the old colony of Plymouth, and was probably copied from their charter, into the Massachusetts, to prevent an interference of claims; the same line is adopted in the charter from King Charles the Second, to the colony of Rhode Island, granted in 1663, and is their northern boundary. The erection of a third government, referring to the same bounds, seems to have rendered it necessary for Plymouth and Massachusetts to ascertain their bounds; accordingly, those two govern-

*214] ments, in 1664, appointed commissioners to survey the most southern branch of the Charles river, and to lay off from thence, three miles due south, as their boundary line by charter; this was accordingly done, and they fixed upon a large tree, then known and since noted by the name of the Angle tree, as the north line of Plymouth, and the south line of Massachusetts. The knowledge and name of the place is preserved, and the commonwealth, in order to perpetuate it, have erected in the place of the tree, the remains of which are now to be seen, a handsome stone monument, which bears the name of Angle tree, and is explained by suitable inscriptions on the different faces of it. This the commissioners apprehend to have been the tree and original boundary, and is three miles south of the most southerly waters of Charles river. It does not appear, that the colony of Rhode Island ever expressed any dissatisfaction respecting their northern boundary, until 1716, or thereabouts, which finally ended in the appointment of commissioners by both governments, in 1818, who fixed a new station about two miles north of the Angle tree, and which was called after the surveyors, 'Woodward and Saffrey's Station.' This place is well known, although no records of it have been preserved, or the proceedings of the commissioners ratified by either government; yet the line drawn from it has been practised upon as the line of jurisdiction between the governments from that to the present time. This commonwealth then lost two miles in width along the northern line of Rhode Island, and seems to have

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acquiesced in the agreement, upon principles of generosity. The ancient charters of New Plymouth and Rhode Island were irregularly bounded on one another: the former, as was supposed, by the shores of the Narraganset bay, the latter, by three miles east of those shores; this interference of boundary, however, appears not to have given any discontent, as the date of the charter of New Plymouth was prior to that of Rhode Island; and the peaceful jurisdiction to the shores of Narraganset bay, was enjoyed not only by the old colony of Plymouth, but by Massachusetts (after these two colonies were united by the charter of 1691), down to the year 1730, at which time the colony of Rhode Island passed an act claiming the jurisdiction of the territory on their eastern boundary, granted to them, by charter; in this act and in the subsequent dispute and determination of the subject, not a claim, nor the intimation of one, but that their northern boundary was satisfactory, as established in 1718. In 1740, the king of Great Britain, who was then the sovereign of these states, appointed commissioners to hear and determine the dispute then existing between the governments, who, after hearing the parties, came to the determination as in No. 2, by which the extent of Rhode Island charter was allowed, and the jurisdiction of Massachusetts cut off from the shores of Narraganset bay. This judgment, unexpected by either party, was disapproved of by both, and they accordingly appealed to the king in council, where, however, it was ratified in 1746. As soon as this information was received by the colony of Rhode Island, they proceeded to appoint their *commissioners, and assigned [*215 the time of meeting for them to begin running the lines that had thus been determined, and they gave information thereof to the governor of this their province; but the legislature not being convened until some time after the period affixed for the Rhode Island commissioners to begin the survey, they thought it unnecessary for them to join in the commission. These lines we perambulated, in company with the commissioners of the state of Rhode Island, and excepting one or two stations between Providence and Bristol, which were well ascertained, we found that they had encroached upon this commonwealth from one-quarter to three-quarters of a mile in width. We were attended by suitable persons, approved by both parties, for making the necessary observations and surveys. Here, probably, all further dispute relative to boundary lines with the colony of Rhode Island would have for ever ended, had it not have been for the rage of political parties at this time within that colony; one of which, to effect a decided majority, was extremely anxious for an extension of northern jurisdiction. Influenced by these motives, and perhaps, in some measure, by their late success, they, in 1740, brought forward a new claim for extending their northern boundary beyond the line established in 1718; and to support that claim, they appointed commissioners, in 1750, to examine what is now called Charles river, and from the most southern part of the same, to survey off three miles as the boundary of Massachusetts, agreeably to their charter. A plan of this survey was laid before us, and copy of it herewith presented. We have inserted our own survey of what we conceive to be the most southern part of Charles river, as intended by the charter, above Whiting's pond, and the position of the Angle tree. It may not be unnecessary to observe, that at the southern head of what we called Charles river, is a place known by a large chesnut tree; thence the stream descends to Whiting's pond, where

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it forms a considerable lake, and afterwards resuming its proper shape (and now known by the name of Mill river or brooke), pursues its course in a northerly direction, till it joins that stream which is known by the name of Charles river, the confluence of the two streams, six miles more northerly than the chesnut tree at the southern head of Charles ; after perambulating the bounds now practised upon, and ascertaining their deviations from the stations to which they ought to have been fixed, and learning the principles upon which Rhode Island supports her claims, and the extent of them, we adjourned to the 5th day of December last, then to meet at Providence, in the state of Rhode Island ; at which time and place, we met with the commissioners from Rhode Island, and after fully discussing the several claims, and endeavoring to conciliate the difference between the two states, agreeably to the powers of our commission, we were convinced that no agreement can be made at present with them, unless we yield a valuable territory, to which they have no claim, and which we hold not only by repeated charters, but by the agreement of the state of Rhode Island in 1718 ; and so far *216] from its appearing *that encroachments have been made by this commonwealth on that state, that the contrary is notoriously the fact."

The counsel of the state of Massachusetts, after January term 1839, and in conformity with the order and leave of the court then given, filed a plea and answer to the amended bill of the state of Rhode Island. The plea and answer were the same, in all important particulars, as that originally filed at January term 1834. The plea and answer conclude—"And the defendant saith, that there is no other matter or thing in the complainant's said bill of complaint contained, material for this defendant to make answer unto, and to which said defendant has not already pleaded and answered as aforesaid ; all which matters and things pleaded and answered, as aforesaid, the defendant is ready to verify and maintain as the court shall order. Wherefore, said defendant prays to be hence dismissed, with costs."

All the matters in the bill, material in this case, and in the plea and answer, with the exception of the amendments given on pages 213-15, *ante*, are stated fully in the report of the case in 12 Pet. 657 ; and in the opinion of the court, delivered at this term, by Chief Justice TANEY.

The case was before the court, on the sufficiency of the plea and answer. It was argued by *Hazard* and *Whipple*, for the state of Rhode Island ; and by *Austin*, Attorney-General of Massachusetts, and *Webster*, for the defendant.

Before the argument was proceeded in, a question arose between the counsel in the case, on the right of the counsel for the complainants to begin and conclude the argument.

THE COURT held, that by a rule of the court, the practice of the English courts of chancery is the practice in the courts of equity of the United States. On looking into the books of practice in the English courts of chancery, it appears, that the party who puts in the plea which is the subject of discussion, has the right to begin and conclude the argument. The

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same rule should prevail in the courts of the United States, in chancery proceedings.

Austin, for the state of Massachusetts.—The question before the court is on the sufficiency of the plea in bar to the plaintiff's demand, both for discovery and relief. The plea is open to any just exception, either as to its form or substance; but as it purports to be an answer or bar to the plaintiff's complaint, its sufficiency must materially depend on the structure of the bill in which that complaint is set forth. Any answer is sufficient to a bill, which is so framed as to require none. The respondent contends, that this opens, substantially, the whole merits of the case. *Bogardus v. Trinity Church*, 4 Paige 178. The sufficiency of the plea is very different from the truth of it. For the purpose of the present inquiry, all its allegations are to be taken to be true. If the plaintiff denies any of them, he has another *mode of proceeding: it is understood also, that all allegations made in the bill, and denied by the plea, are, for this hearing, to be taken [*217 according to the plea, and not according to the statement of them in the bill; and it is admitted, that whatever is stated in the bill, and not controverted by the plea, is, in this stage of the cause, to be taken as true. If, under these circumstances, the plea leaves the plaintiff without a sufficient cause for discovery and relief, it has answered its office, and must be sustained. The case seems to the respondent in no material degree to differ from a general demurrer to the bill; except only that the allegations of the plea control those of the bill, and are admitted to be true *pro hac vice* only.

Before the sufficiency of the plea can be ascertained, the matter to be answered must be examined and understood. The bill sets forth the plaintiff's title. It is of a form adopted, not very remotely, into the practice of chancery; and requiring, or at least admitting, what the books call, without much propriety, an anomalous or irregular plea; thus applying terms to a plea, which in fact belong to the bill. It introduces, in anticipation, the subject-matter of the defence, and attempts to avoid the effect of it, by special allegations. Substantially, the bill enumerates and recites the letters-patent of the counsel established at Plymouth in 1621; the deed of said counsel to Sir Henry Roswell and others, of 19th March 1628; the first charter of Massachusetts, in 1629, by Charles I. From all these, one fact only is material, and that is not in dispute at all, viz: that Massachusetts became a colony of the British crown, at the settlement of it by the pilgrims, and that its southern boundary line, first mentioned in the letters-patent of 1621, and repeated in the words whenever occasion required, was by "all those landes and hereditaments whatsoever, lying within the space of three Englishe myles on the south parte of the saide river, called Charles river or any or every parte thereof." It is obvious, from these public papers, the effect of which is admitted by both parties, that the southern boundary of Massachusetts was described with sufficient accuracy; and the only matter to be done to fix it with perfect certainty, was to run on the earth, and through the then uninhabited wilderness, the line described in the charter.

The bill proceeds, after referring to the surrender of the letters-patent of the council of Plymouth, in 1635 (17th June), and the planting and

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purchasing of what now is the territory of Rhode Island (which facts are not material or controverted), to recite the charter of the colony of Rhode Island, granted by Charles II. on the 8th July 1643, whereby Rhode Island is bounded "northerly on the said south or southerly line of Massachusetts." The bill states also, the dissolution of the first charter of Massachusetts, by the court of chancery in England; the new charter of William & Mary, in October 1691, re-establishing on this line, the ancient boundary, in the same words, and the Declaration of Independence *218] of the United States: documents not essential to any controverted *point in this suit; unless it be, as before was contended by the attorney-general of Massachusetts, and now again respectfully insisted upon, that the Declaration of Independence repealed all these charters, and established the several former colonies in their new character of sovereign and independent states, by the line and boundary actually enjoyed and possessed by them, respectively, on the day of their political nativity, the 4th of July 1776.

All these documents, not controverted by the plea, and not to be denied with truth, are admitted, with all their legitimate consequences. The bill then proceeds to state, that disputes had arisen, not in regard to any charter, or where the line ought to be drawn in conformity with the provision of those instruments; but where, on the earth's surface, a line corresponding with the charters should be described. It sets forth the appointment of commissioners by each colony, "to settle the boundary line;" the meeting of those commissioners; and their unanimous agreement, certified under their hands, on the 19th January 1710-11; "that a stake set up by N. Woodward and S. Saffrey, in 1642, and since often renewed, in latitude 41° 55', being three English miles distant southward from the southernmost part of Charles river, agreeably to the letters-patent for the Massachusetts province, be accomplished and allowed on both sides the commencement of the line," &c. The commissioners having thus ascertained a point of beginning, and it being necessary to protract the line from that point which they did not do at that time, the bill recites the appointment of other commissioners by the two colonies, and their meeting at Rehoboth, on the 22d October 1718, to protract the line; the fact that they re-affirmed the correctness of the place of beginning, ran the line as described by them, certified their proceedings under the hands and seals of a majority of their whole number, and of the delegation of each colony; and that the general assembly of Rhode Island passed a resolution, on the 26th October 1718, ordering that the return be accepted, and placed to record in the colony books.

It seemed to the counsel of Massachusetts, that if the bill had stopped here, there would be nothing for the respondents to answer; because it is everywhere admitted in the bill, that the line thus run, is that to which Massachusetts laid claim, before Rhode Island was in existence; the line to which Massachusetts was possessed, and over all territory north of which she was in the actual exercise of jurisdiction, when the charter of Rhode Island was granted; and that is all she had ever claimed, or now claims in that direction, by charter, possession or title of any kind. It would seem, too, that both parties to this suit admitted the line by the charter; that they intended to describe on the earth the line so designated in the charter;

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that they did so by commissioners mutually appointed on two different occasions, at the interval of seven years ; and that the plaintiff had accepted and recorded their proceedings, as satisfactory and conclusive, at the time, now more than one hundred and twenty years ago.

*But the plaintiff having thus inserted the bar matter in his bill, proceeds to give his answer to it. It is obvious, therefore, that to [^{*219} this answer, and to so much of this answer only as is material to set aside the bar matter, is the respondent bound to reply. The plaintiff has furnished for the respondent a sufficient defence ; he has set up a bar to his own further proceedings ; and unless he removes the bar of his own procuring, the respondent has no need to make any reply. What then, is the allegation in the bill, which professes to be sufficient to countervail an agreement of this sort ; and of possession in conformity with such agreement for more than a century ?

In the first place, it is apparent in the bill, and distinctly admitted by the learned counsel of Rhode Island, that no fraud is charged to anybody in these transactions ; but it is alleged, that the parties acted under a mistake. It is averred, that the commissioners of Massachusetts, believing, no doubt, that the point which they designated as Woodward and Saffrey's station, was three miles, and no more, from Charles river, affirmed to the Rhode Island commissioners, that it was the proper place of beginning for the line, and that the Rhode Island commissioners, taking the word of the Massachusetts commissioners for true, or searching for themselves and coming to the same conclusion, or examining the map then before them, made by Woodward and Saffrey, were of the same opinion, and jumped together in judgment ; and that the commissioners of the two colonies, in 1718, in running out the line, were actuated by the same means, and established the line, which, as ever before, so ever since, has been the actual line of division between these neighboring sovereignties. And that in all this, without fraud or misrepresentation, there is, nevertheless, a fatal mistake. It is admitted, that all parties acquiesced in the doings of the commissioners, until 1749, more than thirty years ; when Rhode Island discovered, as is alleged, that the stake of Woodward and Saffrey was more than three miles, viz., seven miles from Charles river ; and that the Rhode Island commissioners, and the Rhode Island legislature, acting under this mistake, are not bound by the treaty, compromise, arbitration or award, and have now a right to claim for that cause, by the intervention of this honorable court, to set aside the conventions of 1710 and 1718, and re-examine and adjust the boundary on their present information ; and by the letter of their ancient charters, as they are now understood by the plaintiff.

The residue of the bill recites the *ex parte* proceedings of Rhode Island, to determine the true line, independent of the agreements of 1710 and 1718, and the various attempts made to induce Massachusetts to re-open the matter ; all which were ineffectual, as is confessed by the fact, distinctly admitted, that for all time since, Massachusetts has been a government, colonial, provincial, federative or sovereign, she has had the actual, undisturbed, quiet possession *and occupation, jurisdiction and control of and over the premises in dispute. Now, it seems to the [^{*220} counsel of the respondent, that to this complaint, thus set forth, a demurrer might safely have been filed ; and that to a bill to which a demurrer would

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be sustained, any plea or answer must be deemed sufficient. Such bill contains its own answer. It incorporates the defence ; and whatever else may be said of the plea, it cannot be deemed inadequate or insufficient for the defence.

But the respondent is unwilling that the record should contain only the plaintiff's colored view of the treaty, covenant or arbitrament, entered into in 1710 and 1718. However safe it would be, to admit such a mistake as the plaintiff alleges, yet the facts afford a stronger ground, and the respondent avails himself of it. The plea, therefore, to the substance of which the attention of the court is now solicited ; takes from the plaintiff's bill the whole subject of the proceedings of the commissioners in 1710 and 1718, and treating of each of them severally, avers, that the " whole real and true merits of said complainant's supposed cause or causes of action, claims, grievances and complaints, set forth and supposed in said bill of complaint, were fully heard, tried and determined, in the hearing and by the judgment of said commissioners ; that the agreement was fair, legal and binding between the parties, and was, in all particulars, a valid and effectual settlement of the matter in controversy ; and was had and made without covin, fraud or misrepresentation, and with a full and equal knowledge of all circumstances by both parties ; and that the same is still in full force, in no way waived, abandoned or relinquished ; that the station called Woodward and Saffrey's station, was then well known, the place where it was fixed of common notoriety, and the line run therefrom as aforesaid, capable of being discovered and renewed ; that the said defendant has held and possessed, occupied and enjoyed the land, property and jurisdiction, according to said station and line running therefrom, from the date of said agreement to the present time, without hinderance or molestation." It is certainly true, that the plea does not undertake to say that the Woodward and Saffrey station is three miles southwardly of Charles river, and no more. It does not put in issue, whether now a revision of the line, according to the charter, would describe the same place.

If the plans exhibited in this case, either by Rhode Island or Massachusetts, are correct, no revision could alter the line ; for it is clearly within three miles of one of the branches of that river ; and the only question would be, whether the charter, by the terms in it, viz., "on the south part of Charles river, or of any or every part thereof," meant to include one of the forks as part of the river, or not. But the geographical and historical facts, which are notorious, and, of course, to be taken notice of by the court (one *221] of which *both these maps prove), are important in the case. Charles river had never been explored, in 1642, by any European, and its borders were occupied only by savages. Woodward and Saffrey went there to determine the river ; the off-set of three miles ; and the line of boundary. It is very immaterial, how they determined it. The stream called Charles rives acquired that name not from nature, but man. When and what was called Charles, became Charles ; what was called part of the river, was, for all human purposes, thenceforth known and notorious as part of the river. They fixed their station within three miles of water flowing into the main stream. They found, or they called, this water, Charles river. If it was unquestioned, it must have been conclusive. If it was questioned or questionable, if after Rhode Island came into existence, and in 1710, near seventy

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years after the naming of this water by Woodward and Saffrey, it was brought into question by Rhode Island, it was then a proper subject of settlement, compromise and agreement for the commissioners; and their decision settled the matter conclusively for all after time. It was the very question they met to settle; and their opinion, judgment and award, made it what they determined it to be.

The respondent contends, first, that it is not necessary to the sufficiency of the plea, to controvert or notice in any way the suggestion of a mistake. 2d. That mistake or no mistake are substantially and sufficiently put in issue by the plea, so that the plaintiff may join the issue there tendered, if he pleases.

On the first point, it is respectfully submitted, that where a party alleges a proceeding to be had under a mistake of fact or law, and sets forth the circumstances in which he supposes the mistake to exist, if, by the circumstances so stated, it is apparent, that there was no mistake, the allegation may be treated as a nullity. The legal inference from the matter so stated, and not the term applied to it, must regulate the pleading of the adverse party, and the decision of the court. Story Eq. Plead. § 680, and note.

The plaintiff sets forth his circumstances of supposed mistake. They are these: Massachusetts being in possession of a line of boundary, Rhode Island complains, and proposes a joint commission to settle it. Commissioners meet. Governor Dudley, on the part of Massachusetts, tells Lieutenant-Governor Jenckes, of Rhode Island, that the true point is the Woodward and Saffrey station. Governor Jenckes, either knowing that fact himself, before; or in some other way being convinced, agrees to it, and signs an award fixing that station as the point of beginning. Nine years after, the same thing is repeated by other commissioners, and the whole line run from that point. The bill does not allege, that the Rhode Island commissioner believed the station to be the true one, because Governor Dudley told him so; but avers that he did believe the fact, which being the very thing he was commissioned to ascertain, it must, at *this distant day, be supposed, that he believed it on sufficient and satisfactory examination. [*222 It is obvious, that this, by the plaintiff's own showing, is no mistake, as that term is understood in equity.

When negotiators meet to decide a question, it is impossible but that one must make an assertion to the other, which after the lapse of an hundred years, the generation of the then present period may deem wrong in point of fact. So, of arbitrators or referees. If a decision that should appear to the heirs of a remote ancestor to be wrong, could be re-investigated, on the allegation of the losing party, that the verdict or judgment was a mistake (which every losing litigant is ready enough to make), there could be no end to law-suits; and the decision which this court may pronounce in this case, may, on the same principle, be revived an hundred years hence, by a suggestion that there was a mistake in the forming of it. It is impossible, that any declaration made by Governor Dudley one hundred and thirty years ago, could be known now; and the suggestion of the plaintiff, in this regard, must be a mere fancy-sketch. The allegation, if made, could be only the declaration of an opinion. Gov. Dudley died in 1720, aged seventy-three years. 1 Holmes' Annals 525. The fact referred to occurred in 1642, five or six years before he was born. The statement of an opinion

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is no misrepresentation. *Scott v. Hanson*, 1 Simons 13. Such a statement is not calculated to deceive, but rather to put the opposite party on his guard. *Trower v. Newcome*, 8 Meriv. 704. Ignorance, which might have been remedied by due diligence and inquire, is no cause for relief. *Penny v. Martin*, 4 Johns. Ch. 566. And Lord LOUGHBOROUGH has emphatically said, ignorance is not mistake. If the Rhode Island commissioner acted on such representation, supposing it was made, and if it was false, yet his action is not to be considered as founded in a mistake, as that term is understood in equity; because the relations of the two commissioners was not such as to induce one to place a known trust in the other; but the contrary. *Fox v. Mackreth*, 2 Bro. C. C. 420; *Smith v. Bank of Scotland*, 1 Dow P. C. 272; *Laidlaw v. Organ*, 2 Wheat. 178, 195; *Evans v. Bicknell*, 6 Ves. 173, 182-92. Such representation would not vitiate a sale; *a fortiori*, not an arbitrament. *Fenton v. Browne*, 16 Ves. 144; 2 Kent's Lectures (2d ed.) 484-5. If there was no false representation; if the Rhode Island commissioner believed a fact, the truth of which it was his special duty to investigate, and which he had the means of investigating: and all this appears by the plaintiff's bill, the judgment and the award was not mistake, but conviction. The plaintiff, by calling it a mistake, cannot change the rule of pleading or of equity; and it may be treated as a misnomer or a nullity.

*223] *In further considering this allegation of mistake, the great questions arise, in what relation or capacity did the present plaintiff and respondent stand to each other at that time? What was the capacity of the commissioners by whom the line was run? and what is the law of a case so situated? If the parties now before the court stand here as common suitors, corporations, or individuals, controverting the boundary of an estate, and these commissioners are referees or arbitrators mutually chosen to decide the controversy; then the rules regulating the proceedings of an arbitrament and award at common law or equity, may well enough be invoked, to determine the question before the court. But in this view, the mistake of law or fact, the wrong judgment and erroneous decision of arbitrators, do not authorize the re-opening and re-examining their proceedings. *Knox v. Symonds*, 1 Ves. jr. 369; *South Sea Co. v. Bumsted*, 1 Eq. Cas. Abr. 77; *Shepard v. Merrill*, 2 Johns. Ch. 276; *Delver v. Barnes*, 1 Taunt. 48, 51; *Morgan v. Mather*, 2 Ves. jr. 18; *Jones v. Bennett*, 1 Bro. P. C. 528; *Ching v. Ching*, 6 Ves. 282; *Ansley v. Goff*, Kyd on Awards 354; Mitf. Plead., by Jeremy, 131-2; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Kleine v. Catara*, 2 Gallis. 61; *Dick v. Milligan*, 2 Ves. 23; *Young v. Walter*, 9 Ibid. 364; *Wood v. Griffith*, 1 Swanst. 55; *Auriol v. Smith*, 1 Turn. & Russ. 126; *Goodman v. Sayer*, 2 Jac. & Walk. 261. These cases go the whole length of establishing the position, that the mistake of the arbitrator on a matter of fact or law referred to him, cannot be inquired into; or rather, that his judgment and opinion make the rule, and there is no authority above him competent to say that his decision is a mistake. Lord Commissioner WILSON, in one of the cases (*Morgan v. Mather*), says, "It would be a melancholy thing, if, because we differ from arbitrators in point of fact, we should set aside awards." And Lord Chancellor ELDON, in *Ching v. Ching*, states in strong terms, "if a question of law is referred to an arbitrator, he must decide it; and though he decides wrong, you cannot help it." The case is different, where arbitrators, conscious of a mistake,

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desire to rectify it ; because, in that position, the supposed decision is not their judgment ; and this consideration reconciles any cases of a seemingly different character from those above cited.

This supposed mistake may, however, even on the strict rules of equity practice, be passed without notice in the plea, because the allegation of the plaintiff renders it invalid by lapse of time. It is of ancient date, and from that circumstance impossible to be ascertained ; or if ascertained, to have any present operation. Courts of equity, by their own rules, independent of any statute of limitations, give great effect to length of time ; and they refer frequently to statutes of limitations, for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity to any particular demand. *Beckford v. Wade*, 17 Ves. 87 ; 2 Sch. & Lef. 626 ; *Purcell v. McNamara*, *14 Ves. 91 ; *Gifford v. Hort*, [*224 1 Sch. & Lef. 406 ; *Bogardus v. Trinity Church*, 4 Paige 178. Now, though the question before the court assumes to be one of pleading, and not of equity, yet it is maintained by the respondent, that a plea is sufficient which leaves no material matter unanswered ; that what is not answered redounds to the benefit of the plaintiff ; and if this mistake is not answered, it may count for him *valeat quantum*. But if it is in itself immaterial, and of stale character, it may be passed over without notice, because it can in no shape make out a case for the plaintiff.

Secondly, the respondent contends, "that all which the strictest rule of equity pleading requires in this case, is met by the allegation in the plea, that the "said agreement was fair, legal and binding between the parties, without covin, fraud or misrepresentation, and with a full and equal knowledge of all circumstances by both parties." This allegation is not now controverted ; and it seems to the respondent's counsel impossible to say, that with a full and equal knowledge of both parties, their unanimous determination of the question submitted to them could be a mistake relievable in equity. To the form of the plea, no exception is taken by the learned counsel for the plaintiff ; but he contends, that it is novel and insufficient in this, that it pleads possession as a bar, and not title. To an action at common law or at equity, where the usual statute of limitations applied, this exception might, if well taken in point of fact, cause some hesitation. But it is not founded in a correct estimation of the character of the plea. The respondent, in his plea in bar, asserts his title to the territory in dispute, and derives it from the joint effect of the agreements of 1710 and 1718, and possession under them for ever. It may be, that under the peculiar circumstances of this case, neither the agreement, if made against the letter of the charters ; nor possession, if held adversely and without consent, could sustain the respondent's claim ; nor is it material to inquire, how this would be, because in truth and fact the title of the respondent rests on neither one of those pillars alone, but on both ; upholding, strengthening, confirming and supporting each other, and forming together a foundation of irresistible strength. They have not been separated for more than a century ; and ought not to be separated now, in the matter before the court. The true character of the plea is, title derived in part from two sources, and concentrating into one point, that of indefeasible right. 1 Chit. Plead. 512, and the cases there collected.

But before this plea can be overruled for any technical exception of this

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or any other sort, the court will come to the consideration of a much more important or interesting question than yet has been presented; full of novelty and grandeur, and suited to the cause, the parties and the court. The question thus presented is this: By what code of laws, by what forms of proceeding, by what principles of judicial construction, is this controversy to be settled? It is impossible not to perceive, *that the case before *225] the court is not one of ordinary judicial cognisance. It is not the boundary of a farm or a water-lot that is in dispute, but the limit of a nation. It is not a question of ownership in the soil that is presented, but of jurisdiction over a territory and its inhabitants. The parties, too, are not ordinary suitors in a court of justice; they are states, called by the plaintiff "sovereign states;" and standing in that relation to each other, before this high tribunal, which, like the ancient Areopagus, is to adjudicate on the tranquillity and peace of mankind.

The court, on solemn consideration, has decided, that on these great interests of territorial jurisdiction and state sovereignty, and on the transfer of the allegiance of 5000 people from one civil government to another, essentially different in many of its institutions, customs and laws, it has a constitutional power to pronounce judgment and decree justice. Be it so: this point is not now to be controverted. But whence does the court derive this power? Not from its ordinary judicial authority; not as a branch of that prerogative by which it is to decide "cases in law and equity;" but by a special provision of the constitution, for the administering of which no forms are provided; a power above and beyond the reach of any other judicial tribunal in the world; wholly without precedent in the principles of the civil, the canon, or the common law; and vesting in this high tribunal a discretion and authority, which yet has been limited by no legislation of congress, nor by any rules or acts of its own. In a case where "the file affords no precedent," and there is neither common nor statute law to guide the proceedings of the court, the counsel of the respondent respectfully contends, that the case brings with it into this tribunal its own law, in the principles of an elevated and perfect justice, unfettered (as in their nature they are incapable of being fettered) by technical subtleties and petty forms. It stands upon those great and fundamental doctrines of international law, which by the common consent of mankind, are the basis of the intercourse of the civilized world. The high demand of the plaintiff is, that your honors will "restore and confirm to him his violated rights of jurisdiction and sovereignty." These are rights which no private party ever could possess, and over which no other judicial tribunal ever held jurisdiction. The light which is to guide the conscience of the court in this new field, comes not from books of pleading, or reports of adjudicated cases between citizens or subjects. Such matters belong not to them. It is to be found only in the source of eternal justice, as it comes from intelligence and truth.

The case, examined in the character which it thus properly assumes, however important in principle, is one of easy solution. The parties to the suit were once colonies of Great Britain. The relation thus sustained is matter of public history, and familiar to the court. Nominally in a state of vassalage, they were in reality free; and professing a formal allegiance to *226] the British crown, actually *assumed and exercised the prerogatives of sovereignty. They made war and peace; coined money; entered

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into confederacies ; and made treaties of alliance, offensive and defensive, with each other. The proceedings in 1710 terminated in a treaty of boundary, differing in nothing from that of 1783 between Great Britain and the United States, except in extent. No earthly power but the contracting parties ever attempted to interfere with it. It was made by negotiators of each party, with unlimited powers to compromise and settle the boundary. The terms are plain and incontrovertible. The treaty, thus made, established the station of Woodward and Saffrey in latitude $41^{\circ} 55'$, to be three English miles from Charles river, and "that, agreeable to the letters-patent for the Massachusetts province, it be accompted and allowed on both sides the commencement of the line between Massachusetts and the colony of Rhode Island." It is obvious, from the whole of the plaintiff's bill, that this treaty only confirmed and established what had always before been admitted in point of fact. In 1718, another treaty was negotiated, confirming the treaty of 1710, and more fully errying it into effect. These titles to the territory, founded on the solemn faith of two formal treaties, under and by force of which the respondent has always held "unmolested possession," are presented to this court, thus held over sovereigns, on a question exclusively of international law, as a bar in equity and justice to further molestation and disturbance.

Whether, being negotiated between colonies, they are entitled, by the law of nations, to be termed treaties, or only conventions, agreements or pactions, they are by that law equally sacred. Vattel 193, §§ 154-5 ; 227, § 215. Why are they not binding? The suggestion in the plaintiff's bill, that they were not ratified by the mother country, is a poor attempt at self-stultification. They needed no ratification. They were not repudiated by Great Britain ; and like all acts of the colonies, were in force until disallowed. If it were otherwise, it would be more consistent with the high character of our esteemed fellow-citizens of Rhode Island, to imitate the Roman honor of the Consul Fabius Maximus, who, when the senate would not ratify his agreement with the enemy, sold his private property to make good his word ; or that other Consul, Postumius, who, because the senate would not confirm his treaty with the Samnites, adjudged that he himself and his colleagues should be delivered into their hands. The answer to all this by Rhode Island is, that the negotiators made a mistake. To this the reply is, that it is denied in the plea. But if the allegation be admitted, the mistake of negotiators never was, and on principle never can be, a just cause for violating the stipulations of a treaty. Of this principle, the diplomatic history of the United States is full of examples, and conforms to the diplomacy of civilized Europe.

*Possession, or, as it is called in books on international law, usucaption, for a long period of time, is the best evidence of a national [*227 right. Vattel, 187, 191, &c. The possession of Massachusetts began before Rhode Island was created, and has never been interrupted for a day. This is an insuperable bar to the long-delayed claim of the plaintiff. Of itself, it is invincible. The only answer to it now, is, that it is joined with another title, equally strong, which two are not to be united in the same plea. One reply to this objection has already been given ; but there is a stronger one, in the present aspect of the case. Under the law of nations, forms cannot obstruct justice. There are no technicalities, and no common-law prac-

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tice, in a congress of nations ; nor can any be admitted before this august tribunal, sitting under its high constitutional commission, to settle the rights of sovereignties, and to administer justice in political controversies between independent states.

Hazard, with whom was *Whipple*, for the state of Rhode Island.—I had endeavored to prepare myself to argue the questions of law which the state of the pleadings presented to the court ; intending to confine myself strictly to those questions, that I might not trespass upon the time or patience of the court. I did not anticipate, for I could not believe, that the defendant's counsel would, himself, bring into view the merits of the main cause, in a trial upon his own plea in bar to those merits, interposed to prevent their being put in issue or tried. But, finding myself mistaken in this, it becomes necessary for me to pay some attention to the statements made by the counsel, lest he should consider them as being acquiesced in.

The facts stated in the plaintiff's bill, we think, constitute a good cause for the relief asked for ; and we believe that we can prove those facts. The defendant, while, by his pleading, he excludes those facts from the issue and from trial, himself makes statements which we are not permitted to disprove ; because they also are excluded by him from the issue and from trial. But there is this distinction between the statements made by the respective parties. The defendant has no right to state facts which he refuses to put in issue or have tried. But it would not be departing from the merits of the law question of the sufficiency of the plea in bar, for the plaintiff to show the material facts he would be able to prove, if not precluded by the defects of the plea. At present, however, I ask leave to appeal to facts, only so far as may be necessary to correct the erroneous statements made by the defendant.

I understood the counsel to say, that he resorted to the merits of the cause, and to one of the charges in our bill, for the purpose of showing that, at the time of the Roxbury agreement of 1710-11, there was a serious misunderstanding between the parties, as to what was the most southerly part of Charles river, at the distance of three English miles south from which, the southern boundary *line of Massachusetts was to be run, *228] east and west, agreeable to her charter ; Rhode Island claiming to measure from Charles river proper, as it is now known ; while Massachusetts insisted upon taking the head of a brook, called Jack's Pasture brook, or Mill brook, as the most southerly part of Charles river ; and that this misunderstanding led to a compromise which was effected by the agreement at Roxbury. But the charge referred to negatives instead of countenancing this supposition. For it speaks of the pretence about Jack's Pasture brook, as one that is set up against the present claim of Rhode Island, which was made upon Massachusetts, in 1748 ; and has since been adhered to and prosecuted to the present time. But besides this, it is plain from the reports of all the committees from 1710, 1711 and 1718 to 1791, that Mill brook was never thought of as in any way affecting the question of the boundary line, until the idea occurred to, and was for the first time, started by the Massachusetts committee of that last year, 1791. In the old reports of 1710, 1711 and 1718, no mention is made of any such brook ; and it is

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not likely that the committees knew of its existence, for they took no view even of Charles river itself. They adopted the supposed Woodward and Saffrey station, because set up (they said) by skilful and approved artists, as far back as 1642; and believed to be on the true charter line. The same ground was taken by the Massachusetts committee of 1750, which was appointed, as the report shows, to run the line from the pretended Woodward and Saffrey stake. Not to ascertain what was Charles river, nor where the true boundary line was or ought to be, nor to run any such line. But, after the Rhode Island committee of 1750 had, by actual view and survey, ascertained the true charter line, and found that the line chalked out by Massachusetts for herself, was really eight, instead of three miles off from Charles river, and gave to that colony a part of the Rhode Island territory, averaging five miles in breadth by twenty-three in length; it would not do any longer to rest upon the naked authority of the imaginary Woodward and Saffrey stake, which had been acquiesced in, only because it had been asserted to be on the true line, and nothing to the contrary was known. The Massachusetts committee of 1791, therefore, cast about for something to give a color of pretence for adhering to the old position, after it had been thus exposed. And in their difficulty, they quit Charles river, and run up into Mill brook, and through Whiting's pond, two and a half miles off, and then into another brook still farther on. Their report (annexed to the bill) shows this. After mentioning that the Rhode Island committee measured from Charles river as it now is, they say, "we have inserted our own survey of what we conceive to be the most southern part of Charles river," &c. And the report then tells how they made the matter out, as has just been related. Here it appears, that the pretence about Mill brook was a new one, and their own. They do not speak of it as having ever before been thought of, but as a conception of their own.

The allegation, therefore, that there had been a dispute about this *brook, in 1710-11, which had led to a compromise then made, is wholly unsupported and unfounded. Indeed, the idea that Charles [229 river ever could have been mistaken for Mill brook, or the brook for the river, or that they ever could have been identified and taken for one and the same, appears to me to be preposterous. Charles river had its present name, the only name it has ever had, even before the first settlement was made by the Massachusetts colony. It was so named in the first charter, by King Charles I. to that colony, in 1629. Whoever first went there and saw it, marked it as one of the great natural boundaries for the colony. A boundary definite and permanent, about which there could be no uncertainty or dispute. Having the broad river before their eyes, although in the wilderness, and not far to be seen, it is not likely that they spied out the particular tributary brook, much less that they groped their way through the bushes and swamps, to see where it came from, that they might honor it, Whiting's pond, Jack's Pasture brook, and all, up to the big chesnut tree, with the name of the king.

The counsel thinks that he sees evidence of a compromise, in the clause of the Roxbury agreement, leaving five thousand, or the land within one mile north, to the inhabitants of Providence or others. But the committee assigned their own, and a different reason, for that clause; which was, that some of the inhabitants of Providence had laid out lots there. But it is

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not pretended, that any notice was taken of that clause by the government of Rhode Island, or that it was ever acted upon by either government. Again, if the Roxbury committee had been making a compromise instead of ascertaining and fixing the charter line, their report would have shown it, and the grounds of it. They were bound to show this ; for their respective legislatures had a right to know what they did, and why they did it. Now, the report of this committee, on the face of it, negatives the supposition of a compromise. It professes to go by the charters ; and that the station agreed upon was on the true charter line, and no more than three English miles from Charles river. And so the general assembly of Rhode Island was led to believe ; and not that anything was done by way of compromise. A singular compromise it would have been, certainly, had it been so intended ; by which Massachusetts took to herself five miles of the Rhode Island territory, and in consideration thereof, allowed the inhabitants of Providence or others, to retain the land within one mile, but under her jurisdiction. Whether that territory does or does not justly belong to Rhode Island, by her charter, and equally so by the charter of Massachusetts, is the question which constitutes the merits of the main cause ; and can only be tried when those merits are put in issue.

Some further disclosures are made in the report of the Massachusetts committee of 1791, which ought not to be overlooked. Having mentioned, that old Plymouth colony and Rhode Island had the same northern boundary on Massachusetts, the report says : " The erection of a third government, referring to the same bounds *(the Rhode Island charter of *230] 1663 had then just been granted), seems to have rendered it necessary for Plymouth and Massachusetts to ascertain their bounds." Accordingly, commissioners were then (in 1664) appointed, " who fixed upon a large tree, called the Angle tree, as the north line of Plymouth and the south line of Massachusetts," etc. " This (says the report) the commissioners apprehend to have been the true and original boundary ; and is three miles south of the most southerly part of Charles river." They then mention the appointment of commissioners by Massachusetts and Rhode Island, in 1718, " who fixed a new station, about two miles north of the angle tree," called Woodward and Saffrey station. " This commonwealth then lost two miles in width along the northern line of Rhode Island." Thus, these Massachusetts commissioners themselves falsify the pretended Woodward and Saffrey station, which they call a " new station," fixed upon in 1718. And it is a striking fact, that although the settlement with Plymouth was only twenty-two years after the date now assigned to the Woodward and Saffrey station, yet, in that settlement, not a word was said about any such station. The plain inference is, either that none such existed, or that Massachusetts concealed it for the purpose of gaining two miles more upon Plymouth ; and that with a view to fixing a line for Rhode Island, without giving Rhode Island any notice of her doings, or allowing her to be a party to them. The probability is, that no such station was ever heard of, until Colonel Dudley asserted that there was or had been one. The report in my hand states, that no record of it had been preserved. The Massachusetts committee of 1750 say, that they found none ; and it is plain, from all the other reports, that none existed at their dates. Even Dudley himself did not pretend that

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he had ever seen any. And there is not in the whole case, a particle of evidence, that there ever was any such station in existence.

It is necessary that I should now take one more look at this now important Jack's Pasture, or Mill brook, and notice the use which the Massachusetts committee of 1791 endeavored to make of it; and which the defendant endeavors to make of it, since it was then brought into notice. That committee, in its report, says: "It may not be unnecessary to observe, that at the northern head of what we call Charles river, is a place known by a large chesnut tree; thence the stream descends to Whiting's pond, where it forms a considerable lake, and afterwards resuming its proper shape (and now known by the name of Mill river or brook), pursues its course in a northerly direction till it joins that stream, which is known by the name of Charles river." Here, the committee themselves mark the distinction between Charles river and the brook that runs into it, calling each by its own proper name, by which it had always been known and still is. If all the tributary streams which find their way into a river are to take its name, and to be considered part of it, before they reach it, and contribute their mites to its *waters, then would there be a mighty change in the great natural boundaries, by rivers, between nations and states, and [231 even counties. If the Mississippi should be so measured, it would be a wonderful river to behold; and many a great state, and parts of states, would disappear from the map of the United States. But the Missouri is not the Mississippi, nor part of the Mississippi, until it joins it; and if a state should be bounded on a line to be run twenty miles distant from the Mississippi, nobody would dream of measuring the twenty miles from the Missouri as part of the Mississippi. When two rivers or streams come together and form one river, which keeps the name of one of the branches, that name can never be understood to comprehend the other branch, having a distinct name of its own. If, therefore, this Mill brook, instead of being a mere streamlet, creeping into Charles river, was really a principal branch of Charles river, having its own proper name; neither that name nor the brook could ever be confounded with the river or its name, until they were swallowed up in the main river.

Here, your honors have the real and only question between the parties, upon the merits of the cause, under the charters. That question (as first raised by Massachusetts committee of 1791, and never before) is, whether the first charter granted to Massachusetts, by King Charles I., in 1629, by the name "Charles river," meant Charles river proper, as it was then and ever since has been known and called; or, besides this, meant also Jack's Pasture, or Mill brook, running from near a large chesnut tree into a pond called Whiting's pond, two and a half miles off from Charles river, meant also the said Whiting's pond; and moreover, another brook running out of the pond, and finally getting into Charles river. This, I repeat, is the only question upon the merits, as the defendant himself has made it. If the defendant is willing to have a trial upon the merits, let him put them in issue, or allow us to put them in issue. Both parties would then have an opportunity to produce their evidence applicable to that question. Among other evidence, we have in our possession certified copies of a large number of original grants, from 1659 to 1698, to individuals, of lands, bounded, some on Charles river, and some on Mill brook, or Jack's Pasture brook;

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all of them showing, that the river and brook were never confounded together, but were always distinguished by the same separate names they now are. We have also much other material evidence upon that question of the merits. But your honors cannot now hear any of it, because that question is not in issue, or on trial. The defendant virtually acknowledges the original title of Rhode Island, by setting up a supposed cession or grant from her, in bar of that title. Let him, then, present that bar matter and our reply to it, in such a manner that they can be fairly tried. Let him not deprive us of a fair trial upon one question or the other, either upon the merits, or the bar, or both; as he had it in his power to do under the 23d rule of practice established by the court; allowing a defendant to have the benefit *of his bar matter, under his answer to the merits, as fully *232] as he can by pleading it specially.

I will now proceed to consider the question of the sufficiency of the defendant's plea as a bar. This plea is in bar to the whole bill. The requisites of such a plea being familiar to the court, we have only to inquire whether the present plea possesses those requisites. Our objections to it, I will endeavor to bring under one or other of the following heads: 1. The matter of the plea does not constitute a bar to the relief prayed for. 2. The plea does not contain the statements of facts, and the averments necessary to a good plea in bar. 3. The plea is not accompanied by such an answer as the rules of equity require to support such a plea, and to give to the plaintiff the benefit of the material facts charged in the bill in avoidance of the plea.

The plea commences with relating, than in the year 1642, a station was erected and fixed at a point then taken and believed to be on the true boundary line between the two states. So mere a story as this, would be thought too loose and light for the use of a common annalist, whose work is very unlike that of a special pleader. A station was taken, it is said; and we are left to conjecture, that it was erected by one Woodward and one Saffrey, by its being called the Woodward and Saffrey station; who in another place are called skilful and approved artists. But the Massachusetts historian, Dr. Douglass, tells us, that they were two illiterate and obscure sailors, and would never have been heard of, but for the controversies between Massachusetts and Connecticut and Rhode Island. There is no report or statement from Woodward and Saffrey themselves of their doings, and no record of any. The plea says, that the station then set up was believed to be on the true line. This mode of expression would hardly have been used, if any actual survey had been made, and the real charter line ascertained by actual measurement. The plea avoids stating that Woodward and Saffrey were employed by Massachusetts, or authorized by anybody. If they acted under the orders of the Massachusetts government (which I do not doubt, if they acted at all; which I do doubt, because I see no reason for believing it), then, what was done was the *ex parte* act of Massachusetts, and not binding upon anybody. It is not pretended, that any notice was taken of Rhode Island in what was done. Indeed, it was only about six years before that date, that Roger Williams and his companions, having been exiled from Massachusetts for conscience' sake, took refuge in Providence. It is a matter of history, that neither Rhode Island, Connecticut, New Hampshire, Maine nor Plymouth, were acknowledged by

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Massachusetts, at that day, as possessing any power independent of herself. At that early period, she assumed to be mistress over all the surrounding territories ; and she drew her lines and erected her stations as she pleased, without consulting her feeble neighbors, and in defiance of them. And that she most wantonly encroached upon them all, is a matter *not only [*233 of history, but of judicial record. It seems to me, that the defendant can add no strength to his plea in bar, by basing it upon his own *ex parte* act, and insisting upon that act as the source and foundation of all the subsequent proceedings which he sets up as matters in bar, to a claim founded upon his own charter as well as upon the charter of a sister state.

The plea proceeds to state, that, by virtue of an act of the general assembly of Rhode Island, passed the 30th of July 1709, Major Joseph Jenckes was appointed to meet Colonel Dudley, who was appointed by Massachusetts, and to settle the misunderstanding about the line, &c. : "provided, it be within six months after passing of the act of the said assembly ;" that "said Jenckes and Dudley, on the 19th day of January, then next ensuing, and within six months from the passing of said act," did meet and conclude the following agreement, &c. Here is an error in the reckoning of time, apparent on the paper. The recited agreement is dated, "Roxbury, January 19th, 1710-11," which was eighteen months instead of six months, after the passing of the act referred to. The mistake of defendant probably arose from not noticing the double dating practised at that day, and including both the old and the new style. By the old style the year commenced and ended on the 25th of March. So that the same month of January, which was part of the year 1710, by the old style, was the commencement of the year 1711, by the new. But, take it either way, the month of July 1709, was eighteen months prior to the date of the instrument. This being the case, the agreement of Jenckes and Dudley was null and void : Jenckes' authority to act having expired a year before he did act.

The case would have been altered, had the two governments afterwards confirmed the instrument. But no such thing was done by either government, and is not alleged to have been. This instrument, therefore, is no bar to the bill. But, as every subsequent proceeding set up in the plea is therein averred to have been based upon this Roxbury agreement, and taken in pursuance of it ; and as it is from and under and by virtue of this agreement, that defendant claims to have held possession ; I will, with permission, make some remarks upon it, for the purpose of showing its character, and the manner in which it was obtained.

It is stated, that the committee met at Roxbury, and then and there debated the challenges concerning the several charters, &c., relating to the line between the two colonies. This reference to the charters makes them part of the instrument as much as if they had been annexed to it. Now, by the Massachusetts charter, her southern boundary line was to be three English miles south of the most southerly part of Charles river. Thus, the plain duty of the committee was to go to Charles river, ascertain the most southerly part of it, measure off the three miles south, and thence run the line east and west, or erect a monument from which the line might be run. But the committee performed no part of this duty, and took no single step by which the object of their appointment could be effected. *They [*234 took no view of Charles river, made no survey or measurement, nor

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any attempt to ascertain the charter line. On the contrary, Jenckes went to Roxbury, two miles out of Boston, and thirty or forty miles from the place where his business called him ; and there, at the door of Governor Dudley, they debated the challenges, as they call it. This is easily accounted for, and can be accounted for in one way only. The two committees and their respective colonies were very differently situated. It was plainly for the interest of Rhode Island, to have the true charter line ascertained and established, and not to be tied down to the *ex parte* doings of Massachusetts. But Massachusetts had already carved for herself, and was desirous only of keeping what she had taken ; and it was, therefore, the purpose of Dudley, her commissioner and governor, to draw Jenckes away from Charles river, and to avoid having any inspection or actual survey taken, by which, at the same time that the true charter line was ascertained, it would be made to appear that Massachusetts had encroached largely upon Rhode Island. And Dudley gained his point, and brought Jenckes to join with him in saying and agreeing that "the stake set up by Nathaniel Woodward and Solomon Saffrey, skilful and approved artists, in 1642, and since often renewed, &c., being three English miles distant from Charles river, agreeably to the letters-patent for the Massachusetts province, &c., should be the commencement of the line, &c." Can it be doubted, who dictated this instrument, and who drew it ? These representations of the doings of Massachusetts agents were palpably made by Dudley, the then Massachusetts agent, to Jenckes. Jenckes did not know that there ever were such men as Nathaniel Woodward or Solomon Saffrey ; or that they were skilful and approved artists ; or that they ever set up any stake anywhere ; or that it had been often or ever renewed. He did not even know that any such stake then existed, much less that it was three English miles, and no more, from Charles river. Yet, all this Dudley induced him to subscribe to. If it was allowable here, we could show that the very same language used in this report about Woodward and Saffrey, and their skill, and their station, &c., was Dudley's language, used in a communication from him made four years before. And the very truth is, that Jenckes's appointment was procured by Dudley himself, as appears by the vote itself, passed by the general assembly in July, and referred to at the commencement of this plea, as giving Jenckes authority to act. Which vote recites, that, "whereas, the assembly has been credibly informed that his excellency Colonel Dudley has declared, that if Major Joseph Jenckes was empowered thereto, he doubted not but that they two should settle," &c. The general assembly did not foresee the use that Colonel Dudley was to make of his Major Jenckes.

I do not forget, that we are now trying the sufficiency, and not the truth of defendant's plea. But the averments in the plea cannot cover or protect such marks or evidences of mistake, misconduct, undue influence, &c., as appear upon the face of the instrument *itself, pleaded in bar ; for
 *235] these go to show the invalidity of the bar. There are other such marks on this instrument. The line, it says, is to be run "as is deciphered in a plan or tract by Nathaniel Woodward and Solomon Saffrey, now shown to us, and is now remaining on record in the Massachusetts government." It is a trifling circumstances to remark upon ; but it is now acknowledged, that the plan or tract spoken of was never on record in Massachusetts, otherwise than as it was deposited in the secretary's office ; and if Dudley then had it

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at Roxbury, it was not then remaining on record. But what had Jenckes to do with this *ex parte* plan, any more than with the *ex parte* station of Woodward and Saffrey; of neither of which had he any knowledge beyond the mere assertion of the adverse party. And let me ask, why was not that plan or tract, or a copy of it, annexed to the instrument of which it was made a part, and which, without it, was a nullity, and could not be carried into effect, any more than a bill of sale of certain articles enumerated in an inventory not annexed or identified? And where is that pretended plan now, that it is not produced here? The counsel says, that it is on record, or on file; and will be produced on proper occasion. And is not this the proper occasion, when the validity of the instrument, of which the plan is made part, is on trial; and that instrument cannot be understood without the plan it refers to and rests upon? The counsel have procured and produced a recent plat, to show the importance of Mill brook. Can it be believed, that the pretended Woodward and Saffrey plan would not be produced, if any thing favorable was to be found in it? I have no doubt, that there was, at some time or other, and now is, a scrawl of some kind, which has been called the Woodward and Saffrey plan or tract. But I am confident, that, whenever it makes its appearance, it will be seen, that the person or persons who made it, whether Woodward and Saffrey, or some body else, long afterwards, were grossly ignorant; and no glimpse of light can be obtained from it, to aid in ascertaining the line between the parties.

Lastly, the committee agree that persons should be appointed by the governor and counsel of each state, to show the ancient line, &c. Here we see Governor Dudley again. Massachusetts had, and still has, a distinct political body, so entitled, and with the power of appointment; but there was no such body in Rhode Island. Jenckes knew this, and yet he repeated after Dudley whatever was dictated to him. But no such committee was ever appointed by either government; and is not alleged to have been.

Next, the plea recites parts of votes passed by the two legislatures, in 1717 and 1718, appointing another committee to settle the line, and then sets out the agreement made by those committees at Rehoboth, October 22d, 1718. And the plea avers, that those committees were appointed, and the agreement made, "in pursuance of" the Roxbury agreement of 1710-11, which I have just been examining. It appears, that both legislatures, by their first votes, did restrict *their respective committees to the Roxbury agreement. But the Rhode Island legislature, by its subsequent [*236] vote, passed June 17th, 1718, expressly disowned the Roxbury doings, and gave its committee unrestricted power to settle the line, as near as might be, according to the charter; and the Massachusetts legislature, by its second vote, gave the same power to her committee. And thus the Roxbury agreement, which was void in itself from the beginning, was abandoned by both parties.

The Rehoboth agreement (as it is called, from the place where it was made) is in eight and a half lines, with a preamble; and the whole of it is, that the line should be run from the Woodward and Saffrey stake, so as to be at Connecticut river two and a half miles south of a due west line. This agreement is liable to some of the same material objections that have been made to the Roxbury agreement. The committee paid no regard to the

charters, nor made any attempt to ascertain the true charter line. They arbitrarily adopted the pretended Woodward and Saffrey stake, wherever it might be; without knowing that there was any such stake, or going to see either that or Charles river. The plea then alleges, that the general assembly of Rhode Island accepted this Rehoboth agreement, and ordered it to be recorded; and thereby ratified and confirmed it. I will consider, presently, what kind of ratification this was.

The plea now introduces the last instrument upon which it relies, and which has been called the report of the running committee. That committee consisted of four persons, who say, in their report, that they were appointed by the Rehoboth committee to run the line by them agreed upon. This is the only evidence there is of their appointment by anybody. The Rehoboth report speaks of no such committee; and none such was appointed by either colony. Whatever their authority was, they undertook to run a line, and say, in their report of it, that "having met at the stake of Nathaniel Woodward and Solomon Saffrey," &c. This was speaking loosely. The stake set up by Woodward and Saffrey, in 1642 (if ever set up), certainly was not in existence in 1719. Their meaning probably was, that the stake they met at was where the Woodward and Saffrey stake had been. But how did they know this; and what authority had they for saying it? No doubt, there was a stake where they met, for they would not have been carried there, without a stake for them to start from. But who set up that stake, and where was it set up? Neither the Roxbury committee of 1710-11, nor the Rehoboth committee of 1718, set up any stake or monument. They only speak of a stake said to have been set up by Nathaniel Woodward and Solomon Saffrey, in 1642, and since often renewed, in latitude $41^{\circ} 55'$ (says the first committee), but they saw no such stake, nor knew that any such existed. Thus, this running committee had nothing to go by. They had not the plan or tract of Woodward and Saffrey, nor did they take the latitude $41^{\circ} 55'$, on which the Roxbury report said the Woodward and Saffrey stake was set up; for that latitude would, in fact, have carried *²³⁷ them many miles off from the stake where they met; which (as appears from the line described by the committee) was in latitude $42^{\circ} 3'$. By their own showing, the running committee had no power to fix any station, or set up any stake themselves. How, then, did they know that the stake they saw was where the Woodward and Saffrey stake had been? They could only believe from what was told them; and that, in all probability, by persons interested, and who had themselves set up the stake they wished the line to be run from. It was the tradition in that quarter, for many years, and derived from the old men of the day, that the pretended stake was a bean pole, stuck up by John Chandler, one of the running committee. At all events, that committee had no right to hear evidence, for they had no power to decide. Thus, from all that appears, there is as good cause for believing that the stake from which these four men started, was anywhere else, as that it was at or near the place of the Woodward and Saffrey stake, if there ever was any. For myself, I can see nothing in all those proceedings, from beginning to end, but imposition, and the exercise of undue influence over the Rhode Island committees.

The plea then alleges, that the said report or return of the running committee "was approved by the general assembly of the said colony of Rhode

Island," &c. This is copied from our original bill ; but in the amended bill (page 36), those words are stricken out, being incorrect, and the words, "the above return is accepted by the assembly—a true copy, extracted from the public records of the colony of Rhode Island, examined by T. Ward, secretary," inserted. That being the minute appearing on the document itself. I have no desire to be critical, but it may be observed, that there is no vote of acceptance. A secretary or clerk can only certify to a copy of a vote. He has no authority to certify that such or such a thing was done, or vote passed. The record is the only evidence of votes ; and certified copies are the evidences of the record.

But what does it amount to, if there were such a vote ? It was no more than the ordinary form on such occasions. When a legislative committee makes a report, something is to be done with it ; and the usual course is, to receive or accept it ; and then it is laid on the table, or ordered on file, or taken up and acted upon. The same course was pursued in the legislature of Massachusetts, as appears by the secretary's minutes, on some of the reports of their committees. But the report so received or accepted is nothing of itself, until some legislative act is passed upon the subject of it.

But the legislature of Rhode Island never passed any act confirming the doings of either of those committees, or establishing either of the lines (for they all differ) spoken of by them. Nor did the legislature of Massachusetts ever pass any such act ; and it is not alleged that she did. And if one of the governments had confirmed those proceedings, by ever so solemn an act of ratification, *the other could take no advantage of it, without passing a similar and mutual act of confirmation on her part. [*238

But as there was no such ratification by either government, it seems, that the defendant would now set up the doings of the committees, as binding and absolute in themselves, without any legislative acts confirming them ; thus making the committees independent of, and paramount to, the legislatures which created them. This is novel, and I should think, dangerous doctrine. If this is true, the moment the legislature passed a vote appointing a committee to perform a certain service, it parted with all power over the subject ; and could neither revoke the appointment, nor vary, nor in any way touch, the powers of that committee. This was not the understanding of either legislature, at the time of passing the votes and appointing their committees, as has already been shown. The boundary line between Massachusetts and Connecticut (which by their charters was precisely the same as ours) was agreed upon by a joint committee, in 1713 ; and the doings of that committee were ratified and confirmed by mutual acts passed by both legislatures ; and it was those legislative acts of confirmation, and not the report of the committee, upon which Massachusetts wholly relied, in their subsequent dispute respecting the line. And even those solemn acts of ratification were set aside for the same causes and grounds which we are now presenting to the court. This, as I before remarked, is new ground, even for Massachusetts to take. For her own committee of 1791 (whose report, jointly with the Rhode Island committee, is copied into our bill, and whose separate report to their own legislature is annexed to the bill, and has already been referred to), that committee, remarking that the proceedings of the former committees had not been confirmed by either government, joined with the Rhode Island committee in

recommending to their respective governments "to submit the matter in dispute to indifferent men of the neighboring states; or to unite in an application to congress to settle the same, agreeably to the respective charters, and the constitution of the United States."

I have thus far endeavored to show from the plea itself, that the matter contained in it does not constitute a bar to the plaintiff's bill; and will now, with permission, proceed to the two other general grounds of objection, which, as they are closely connected, I will consider together. They are, 1st, That the plea does not contain the statements of facts, nor the averments necessary to a good plea in bar; and 2d, That it is not accompanied by such an answer as the rules of equity require to support such a plea, and to give the plaintiff the benefit of the matter charged in the bill in avoidance of the plea. I wish it to be understood, that we make no objections to the mere form either of the plea or answer. Our objections are to the merits and substance of them. And we contend, that not a single material fact charged in the bill, in avoidance of the bar matter pleaded, is *239] negatived or met by any averment in the plea, or by *the answer.

So that, as the plea and answer now stand, the defendant would avail himself of his legal defence, while he would exclude the plaintiff from all the equitable facts and circumstances charged in the bill in avoidance of the bar; which, by the rules of equity, a defendant is not permitted to do.

In avoidance of the two agreements pleaded in bar, viz., that made at Roxbury at 1710-11, and that at Rehoboth in 1718, the bill charges, that the Rhode Island committees who signed those instruments were misled by representations made to them by the Massachusetts committees, and acted under the mistaken belief that the pretended Woodward and Saffrey station was really on the true charter line, and was no more than three English miles from the most southerly part of Charles river; and that under this erroneous belief, they signed the agreements; which, if confirmed, would transfer to Massachusetts a large portion of territory justly belonging to Rhode Island, and the jurisdiction over it. This is the general charge; and in support and proof of it, the bill charges the following facts, viz., that by actual survey and measurement, it is proved, that the line alleged to have been run according to those agreements is near eight miles, instead of three miles, distant from the most southerly part of Charles river, and takes from Rhode Island a tract of territory four miles and fifty-six rods wide on the east, and over five miles on the west end; and in length, twenty-three miles; that said line does not conform to the line designated in either of said agreements, it being in latitude $42^{\circ} 3' N.$, whereas, the supposed Woodward and Saffrey station is alleged to have been in latitude $41^{\circ} 55'$; that neither of said committees made any survey or measurement, nor any attempt to ascertain the true charter line; that, at the dates of said agreements, there was no such station as the pretended Woodward and Saffrey station, nor any evidence that there ever had been any; that said committees saw no such station, and took no step to ascertain whether there then was or ever had been any, or how far it was from Charles river, if it did exist.

It was the duty of the plea to have met and negatived the main charge, by direct and positive averments; but there is no such averment to be found in the plea. The principal averment is, that there was no covin,

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fraud or misrepresentation. The bill does not charge covin or fraud, although it might justly have done so. The averment of no misrepresentation is evasive, and no direct negative ; for the defendant might admit that such representations were made as the bill charges, and yet might consistently aver that no misrepresentations were made, for he might say they were true. But it is of little importance from what source the committees received their impressions ; it is enough, that the bill charges that they acted under an erroneous belief ; and this charge is not touched by any of the averments. The other averments are, that the whole merits of the plaintiff's claim were heard and decided upon by the committees ; that the agreements were fair, legal and binding, and made with a full and equal knowledge of all circumstances by both parties. All *the first part [*240 of this is mere opinion and assertion. A man charged with a breach of contract, might as well reply that he was an honest man, and a man of fair standing. The sweeping allegation that the agreements were made with a full and equal knowledge of all circumstances, has none of the qualities of an averment required in pleading. It is no traverse of any specific charge or fact. No fact charged, however important, could be put in issue under it. Yet that is the whole object of averments in the plea ; which are, therefore, required to be direct and positive, not evasive, or by way of opinion, inference or implication, which it is the province of the court to deal with, not the party.

The bill also charges that the legislature of Rhode Island was deceived, and led to believe that its committees had ascertained the true charter line ; that there really was such a station as the Woodward and Saffrey station, and that it was on the true line, and no more than three miles from Charles river. This charge is most important, because the legislature, if it had not itself been deceived, could have corrected the errors of its committees. Now, there is not a word in the plea or answer that in any way meets, much less negatives, this main charge ; which goes to the roots of the pretended agreements. And the defendant might as well have put no averments at all into his plea, and accompanied it with no answer ; and still have insisted upon having the pretended agreements sanctioned and allowed to be valid, without any examination whatever. Will equity countenance any such practice ? It is observable, that the Roxbury agreement is so framed, and contains such statements, as could not fail to mislead and deceive the general assembly of Rhode Island. The committee professed to go by the charters and letters-patent of the two colonies, as the legislature of Rhode Island expected they would, and supposed they had done. The committee then adopt the supposed Woodward and Saffrey stake, "being (they say) three English miles distant from the southernmost part of Charles river, agreeably to the letters-patent for the Massachusetts province." It cannot be averred here, that Governor Dudley had no hand in making this representation. And how was it possible for the legislature of Rhode Island to avoid being deceived by this representation ?

So much for the averments in the plea. And now, for the accompanying answer—if that can be called an answer, which is a mere repetition of the averments in the plea, without the slightest addition to them. Can such an answer be said to support the plea, as the rule in equity requires that it should ? But to support the plea, is not the only office of the answer.

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It must meet and respond, particularly and specifically, to every fact and equitable circumstance charged in the bill, in proof of the main charge in avoidance of the bar matter pleaded ; to the end that the plaintiff may have the benefit, and avail himself of his equitable defence against the bar. If the answer cannot do this with truth or safety, then the plea is not only a defective and insufficient one, but is an improper plea to be *used. *241] May I not correctly say, that this plea is not supported by such an answer as the rules of equity require ; and without which the plea cannot be sustained ?

Again, the bill charges, that the agreements now set up were never consented to by the king of England ; without which, at that day, the colonies had no power to make any compact affecting their territories or jurisdiction. This being the case, it was necessary for the plea to show the authority of the two colonies to act, as it was to show the authority by which their committees acted. This same objection was made by the state of Connecticut, in her controversy with Massachusetts about their boundary line ; and made too against the validity of the solemn acts of the two legislatures. And how was it met by Massachusetts ? Her reply was, that her government, by its charter, was required to send all its public acts to the king, for his approbation ; and that such of them as were not disallowed within a certain period, were to be considered as allowed. It was, therefore, inferred by Massachusetts, that this course must have been taken upon the occasion of her compact with Connecticut ; and that that compact had been tacitly consented to by the king. In the case of *Poole v. Fleegee*, recently decided in this court, there was a formal compact between the states of Kentucky and Tennessee, settling a boundary line between them ; which compact was formally ratified by both governments, and consented to by congress. The court said in that case : "It is part of the general right of sovereignty, belonging to independent nations, to establish and fix disputed boundaries. This right is recognised by the constitution of the United States, with the limitation or restriction requiring the consent of congress." As, therefore, the consent of congress is necessary to the validity of such a compact, even at the present day, it follows, that a party who pleads such a compact in bar to a suit, must show its validity, by stating the consent of congress to it. But in the present case, the bill itself charges the defect in the Roxbury and Rehoboth agreements ; and the charge ought to have been directly met and responded to by the plea and answer. It is for the purpose of showing the insufficiency of the plea, in this respect, that I mention the charge contained in the bill ; and not for the purpose of discussing here the objection itself to the two agreements, which would not now be proper. But the plaintiff has a right to be heard upon that question, at a proper time, and therefore, the defendant was bound to respond to the charge.

The plea concludes by stating, in substance, that the defendant doth plead the said agreement of 1710-11, and the said agreement of 1718, "and unmolested possession according to the same, from the date of the said agreements, in bar to the whole bill," &c. The opening counsel for the defendant has considered the alleged possession as constituting a distinct bar of itself. If this is the meaning of the plea, it is pleading double ; which is a fatal objection to any such plea. The passages, therefore, read by the counsel from Vattel, to show that prescription may give a good title, are

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*out of place; supposing that the counsel did not mean to spoil his own plea. To be sure, he ought to understand his own plea best; but I suppose that long possession under the two agreements, is alleged in the plea, for the purpose of aiding and protecting them from inquiry into defects in their origin. Long possession is frequently used for this purpose. But this plea alleges long possession only. It alleges no acquiescence in or assent to that possession, without which mere naked possession is of no avail; for it furnishes no inference of the fairness of the original transaction sought to be sustained. This may be illustrated by a very common case. A man obtains a conveyance of an estate, by imposition or some unjustifiable means, which, in equity, vitiates and annuls the transaction; and, having gotten possession, he retains it for many years. But, in the meantime, the injured party, having discovered the imposition or mistake, and the injury done him, demands restitution from the wrongdoer, who holds many conferences with him; but evades the claim and avoids any inquiry into the justice of it, continues to hold possession. It is plain, that in such a case, the continued possession of the wrongdoer, instead of bettering the original transaction, aggravates its injustice. It is laid down by Vattel, page 192, that even prescription or usucaption, cannot be set up against a party who is not in a condition to enforce his rights. This is precisely the plaintiff's case. And this case is clearly and fully made out by our bill. And if the defendant had given us a sufficient plea and answer, so that we might have taken issue, the question of her alleged possession might have been tried, and we should have had an opportunity to rebut and avoid the alleged possession, by producing the facts stated in the bill, and other evidence, proving that the defendant has had no such possession as can give any aid or countenance to the two agreements which she relies upon, and which we impeach. But no such trial upon the question of possession can be had, under the present question as to the sufficiency of the plea; and I can only refer to the facts charged in the bill, for the purpose of showing the insufficiency of the plea in not having met and responded to those facts, so that they might have been put in issue and tried. The bill, after pointing out the imposition or erroneous belief under which the Roxbury and Rehoboth agreements had been signed by the committees, states, that the error or mistake, thus committed, and the wrong thereby done to Rhode Island, were not discovered until an actual survey of the premises was made in 1749-50, by which the true charter line was ascertained. That from that time, Rhode Island never ceased to assert her claim, or to deny the right of Massachusetts to the possession of the territory of which she had wrongfully gotten possession. That the Rhode Island legislature had, time after time, appointed, and continued, committees, for the purpose of effecting a settlement of the dispute with Massachusetts, and had constantly urged that colony, and afterwards state, to appoint committees on her part, for the same purpose; which had been done by Massachusetts, and many conferences *upon the subject of the existing misunderstanding had been held by those committees [*243 from the year 1750, and continued to be held up to a recent date; but without producing any good effect; except in the year 1791, when the committees from the two states, not being able to agree upon the main subject, did agree to recommend to their respective governments to refer the matter

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in dispute to indifferent men of other states, or to congress, to settle the same agreeable to the respective charters; the Massachusetts committee being satisfied that nothing binding on either party had as yet been done. That some time after the committees appointed by the two colonies in 1749-50, had failed to effect a settlement, Rhode Island prepared to prosecute her claim before the king in council. "But that, being then thinly populated, and her resources very limited, and the war with France having soon after broken out, by which her attention was directed to other objects, and her resources exhausted; her endeavors to obtain a settlement of the line according to her charter, were ineffectual; and that her efforts to effect that object were again suspended by the war of the revolution. But that, towards the end of that war, in 1782, upon the petition of a large number of the inhabitants residing on the disputed territory, claiming of right to belong to Rhode Island, the legislature again appointed a committee who reported in favor of said claim."

Besides these, there are other material facts and circumstances to the same effect, which, whenever the question of the alleged possession by Massachusetts shall be tried, will conclusively prove, that from the year 1748-49, when the error in the boundary line was first discovered, Rhode Island has never, for a moment, acquiesced in the justice of that possession, but has constantly denied it, and demanded restitution; and that the character of that possession has not been such as to give any consistency or validity to the pretended agreements of 1710-11, and 1718, or either of them. But as that question of possession is not now on trial, I presume, that the references I have made to the charges in the bill, upon this head, are enough to support our objection to the plea and answer for insufficiency, in not having in any way negatived, met or responded to a single one of those charges. I may, however, be allowed to remark, that, undoubtedly, Rhode Island was always very reluctant to engage in a conflict with her powerful neighbor. And it is apparent, that the part which Massachusetts herself acted, from the time that the error was discovered in 1749, was the chief cause that Rhode Island did not sooner adopt stronger measures enforcing her right. For, the committees which Massachusetts continued to appoint and keep up, although they parried the claim of Rhode Island, yet, by temporizing with her committees, and leading them along, from period to period, encouraged the expectation that an equitable settlement might finally be effected. And certainly, Rhode Island had a right to indulge in this expectation, particularly, after the year 1791, when the Massachusetts committee *itself recommended the appointment of impartial referees *244] to settle the line according to the charters; which they were satisfied had not been done, but ought to be done.

It ought to be recollected also, that, during all that period, the same controversy existed, and was carried on, between Massachusetts and Connecticut. The two complainant states co-operated together, particularly in the measures taken to bring their complaints before the king in council. Connecticut was the larger and more influential colony; and Rhode Island very properly expected her to take the lead in the common cause, relying upon her efforts to bring Massachusetts to justice. But during all that period, there was never any acquiescence by Rhode Island, any more than by Connecticut, in the wrongful possession of Massachusetts; both colonies or states,

equally and constantly protested against that wrongful possession, and demanded restitution. It was not until the year 1804, that Connecticut brought Massachusetts to terms; and certainly, when that was done, Rhode Island had good reason to hope that her claims (resting upon her same basis as those of Connecticut) would also be listened to, and her rights respected by Massachusetts. And accordingly, committees were soon afterwards appointed by the two states to make a settlement between them. And those committees continued their conferences, until no long time before the commencement of this suit. Clearly, Massachusetts had as good a pretence for setting up her long possession against Connecticut, as she can now have for setting it up against Rhode Island, and better; for the agreement made in 1713, by their committees, adopting the same pretended Woodward and Saffrey station, as did the Roxbury committees in our case; that agreement was confirmed and ratified by solemn acts of both governments. But Connecticut would not consent, that a possession, wrongful in its commencement and continuance, and always protested against, should be used to support an agreement obtained by unfair means, and under which that possession had been unjustly held. And Massachusetts acquiesced in the objection, and abandoned the pretence of possession. Can she now revive the same pretence against the other copartner state; with whom she had, at the same time, precisely the same controversy.

The counsel has dwelt and labored upon this allegation of possession, as if the mere fact of possession was the only thing he had to establish. And has read a part of our bill to show that that fact is admitted by the plaintiff; and this, he thinks, settles the whole matter; keeping out of sight the facts charged by way of replication, in the bill (in conformity to the practice in equity), in avoidance of the admitted possession, showing that the alleged possession was unfairly obtained, had been unjustly continued, and always protested against. This is the incurable defect of the plea itself. It tenders no issue upon the only facts upon which an issue can be taken. The fact of possession being admitted by the replication, makes no part of the issue to be joined. The facts charged in avoidance *of that possession, are the only facts to be put in issue, so far as possession makes part of [245 the bar matter pleaded. As well might a defendant who pleads a release in bar, to which the plaintiff replies, admitting the execution of the release, but charging that it had been obtained by fraud; as well might the defendant refuse to have any trial upon the charge of fraud, and still insist upon his naked release, because the execution of it is admitted.

It has been asserted, that Rhode Island was never, for a single moment, in possession of the territory in question. This is saying too much. When the Rhode Islanders were driven from Massachusetts, because they were Baptists and Quakers, they purchased of the native proprietors, and honestly paid for, that part of the Narragansets' country which was beyond the jurisdiction of the hostile colony; and there they colonized and took possession of the country in 1635-36. In 1643, they obtained their first charter, and their last in 1663; confirming their purchase from the native proprietors, and erecting them into a colony, bounded north on the charter line of Massachusetts colony. If certain persons (whatever their names) did go into the wilderness in 1642, and did, somewhere or other, set up a stake, and leave it standing, that act did not interfere with the rights of anybody. If the

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Massachusetts colony had any agency in that (which nohow appears, nor is alleged in the plea), she certainly did not pretend to take any possession adversely to the king, or the king's grant to Rhode Island. Rhode Island, therefore, was clearly in possession, at least down to 1710-11, the date of the agreement between Dudley and Jenckes; as to the possession, which Massachusetts then obtained, how she obtained and how retained it, I have already sufficiently commented upon, more than sufficiently, for the purposes of this argument upon the sufficiency of the defendant's plea.

Sundry passages have been read from Vattel, to show the sacred character of treaties and compacts between sovereigns. Who ever doubted so self-evident a proposition? But what are those treaties and compacts which are so obligatory? They are such as are just and unimpeachable; executed fairly and freely; without *suggestio falsi*, or *suppressio veri*; free from the charge of imposition, or undue practice, or unjust advantage. Is there anything to be found in Vattel, that enjoins the observance of a compact of a different character from this; much more the confirmation of such a compact, when made by agents acting under a gross mistake of facts? I am unable to comprehend the doctrine which would apply different rules and principles of justice to the conduct of sovereigns, and to that of individuals. Justice herself knows no such distinction.

The counsel has intimated, that the habits and feelings of the inhabitants of that district, would revolt at being included within the limits of Rhode Island. He speaks without authority, and is wholly mistaken. Some years ago a large and respectable portion of those inhabitants, in a memorial to the legislature of Rhode *Island, claimed to belong to that state; *246] and solicited the legislature to enforce their right. I am fully warranted in saying, that the mass of those inhabitants still entertain the same opinions and wishes.

Webster, for the State of Massachusetts.—The colonial grant of James I. of England, of the Plymouth colony, was on the 3d of November 1621. The grant was for all the lands lying between the fortieth and forty-eighth degrees of north latitude, extending westwardly from the ocean. On the 19th of March 1628, the council of Plymouth made a grant to the Massachusetts settlers, of the territory destined to form the colony of Massachusetts. This grant was of all the lands lying between the Merrimac river on the north, and three miles south of Charles river, from the Atlantic or Western ocean, on the east part, to the South sea, on the west part. This grant was confirmed by Charles I. The description of the territory is first found in the grant of the council of Plymouth to Massachusetts. Charles river was so called after 1625, and before 1628. At that time, there was not a white man in Massachusetts. It is a very important fact, and lies at the foundation of the question in this case, that at the period referred to, the boundary, three miles south of Charles river, was fixed, when that river had never been ascended by the colonists three miles from its mouth. The first settlement made by the colonists was in Salem. It was made by Governor Endicott. Boston was not settled until 1630; and until that year Charles river was never ascended.

The facts stated in the plea, and which are admitted by the complainants, are, that in 1642, Woodward and Saffrey's monument was set up, to

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establish a south line for Massachusetts. This is clearly and distinctly stated in the early part of the plea. This brings us to the fact, that fifteen years after the settlement of Massachusetts, the monument was established, and was known and notorious. This was the position established for the boundary line of the colony; and it is important to ask, if, by this line, Massachusetts encroached on territory, not a part of her territory, on whose territory did she encroach? Not on that of Rhode Island; for the colony of Rhode Island did not then exist. She must have encroached on the territory of the crown of England. This state of things remained until 1663, when the colony of Rhode Island was established. Charles II. did not grant the territory which composed the colony of Rhode Island, by metes and bonds; other than declaring the north line of the colony to be "on the north, or northerly, by the south or southerly line of Massachusetts plantations."

The colonies established by those grants did not hold under the king of England. The language of the grants, in express terms, excluded this. They were grants in "free and common socage." When Rhode Island received her territory by the grant, she received it bounded by the southwardly line of Massachusetts. This was an *acknowledgment of the boundary. Now, after the elapse of 198 years of full and uninterrupted possession by Massachusetts; as a colony, until 1776, and as a state, up to the present period; she seeks to drive Massachusetts back from this line; and to take from her sovereignty and dominion over three miles of territory. Why is this effort made? Why is this disturbance of the quiet and unmolested possession by citizens of Massachusetts, claimed? Not because Rhode Island has a boundary different from that by which she has hitherto been restrained. She had no rights, when the colony was established, other than to the line now existing between the two states. All she has of boundary or of territory, are, by the express terms of her grant, secondary to those of Massachusetts. She goes up to the southerly line of Massachusetts; and there she must stop, now, as heretofore.

The case presented to the court, on the bill and answer, is that of a second grantee, taking his boundary from a prior grant; and who, after the elapse of 198 years, seeks to disturb the line so long existing and recognised between the prior grantee and himself. On what ground, is this attempt made? It is said, the boundary was fixed by mistake. But the state of Massachusetts does not acknowledge any mistake; unless it is found in the fact, that her true southern boundary, if it had been correctly run, would be yet more south than that fixed by the Woodward and Saffrey station. Going higher up Charles river, a point far south of that station could have been found; which would have fully answered the boundary described in the colonial grant, of a line three miles south of Charles river.

How is it sought to maintain the position, that the Woodward and Saffrey station is more than three miles south of Charles river? It is said, that "Mill brook" and "Whiting's pond" are not parts of Charles river. It is important to bear in mind, as has been stated, that when the station was fixed, but little of Charles river was known. The object of the grant was to give to the colonists the benefit of all the waters of Charles river; and the station was fixed in this view of the subject. "Mill brook" and "Whiting's pond" formed branches of the river, as was then understood,

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and has ever since been so considered. The question now before the court is identical with that which now disturbs the harmony of the United States and England, as to the northern boundary of the state of Maine.

The question before the court is brought under the provisions of the constitution of the United States. By what code of laws is it to be decided? There were no provisions in the articles of confederation, nor are there any in the constitution of the United States, prescribing the modes or rules of proceeding in such a case; nor are there any laws of the land, or rules of *248] court, to regulate such a procedure, except *as to the notice of the institution of the suit. In the history of the world, there is no account of a similar proceeding in any court of judicature. No adjudication of such a controversy is known in any court of the world. If any determination of the case is to be made, it must be under the law of nations. Will this court consider the case as one between individuals; a question of contract; and to be considered by the court with a view to enforce the contract, as if it were between two citizens or two individuals, parties to the controversy? No state in the Union would submit to such a view of the case. Its rights, as a sovereign state, are deeply involved in this question. The rights of the citizens to the government under which they were born; to the laws which they have assisted to make; and under which they have always lived, and desire still to live; under which they have acquired and hold their property; are to be submitted to the court.

The bill filed by the state of Rhode Island calls on the court to change the allegiance of a large number of the citizens of Massachusetts; to oblige them to submit to a different body of laws than those which, by their own choice, have heretofore governed them; to dismember a state; and this, on the ground that, nearly 200 years ago, a mistake was made in fixing the boundary line between the two contending sovereignties. A possession of 198 years is thus to be disregarded; and all the rights of citizenship, all the rights of property, all the affections of the people to the state of their birth, education and prosperity, are to be set aside.

No complaint is made that the controversy between the parties to this case is presented by a bill in equity. It was proper to do so; but this does not change the rules by which the case is to be decided. A court of equity restores the consideration which has been paid by a party to a contract, when it rescinds the contract. Will this court break up the compromise which was made by Massachusetts with Rhode Island; and return to Massachusetts the one mile of her territory which was given by her to Rhode Island when the compromise was made?

This case must be discussed and settled upon principles which will have the sanction of the whole civilized community. What can be more extraordinary and unusual, than an attempt, after the elapse of 198 years, to open a question on the ground of a mistake by the parties who had, at that long by-gone day, adjusted the controversy, in which adjustment, the mistake is alleged to have been made. Louis XIV. broke a treaty solemnly made, on the ground of a mistake in the negotiators of the treaty; and all Europe was involved in war. The remarks of Voltaire on this act of the king of France, will apply to the attempt made in the case before this court, by the state of Rhode Island.

The state of Massachusetts has a right to call upon the complainants for

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a case, in which a natural and ascertained boundary, known and acted upon for so long a period, has been disturbed. Look at *the question presented for the consideration of the court by the agreements between [249 the commissioners of the two colonies, while they were colonies; and which had the acquiescence of the legislatures of both the parties. These are all stated in the plea. It is alleged by Massachusetts, that there is a boundary between her and Rhode Island, of 198 years' standing; that this boundary was established by competent persons in 1710, and again in 1717; and from 1710, to the present time, Massachusetts, as a colony and as a sovereign state, has held the territory now claimed from her. Can a better reason against the removal or change of a boundary be given by any state? Is not this a good diplomatic answer to the claim of the state of Rhode Island? One sovereign and independent state asks territory from another state, of equal rank with herself. She is met by the fact that the territory asked has been in possession of the state from which she asks its surrender, for nearly 200 years. This should settle the question between the states. Established boundaries for 100 years would not be disturbed between nations, with the consent of other nations.

What was the mistake asserted to have been made by the commissioners of Rhode Island? It is said, they were misinformed as to the distance of Woodward and Saffrey's station from Charles river. It is admitted by the complainant, that the commissioners of Massachusetts acted in good faith: and yet the agreement is to be cancelled. Fraud, actual fraud, would not set aside an agreement, after so much time had elapsed. If a party has slept on his case, or has suffered others to act under the belief that the subject was fully and finally arranged, courts of equity would not interfere, after nearly two centuries had gone by; and property had been acquired, civil rights asserted, and undisturbed, during the whole of that long period. Although no attempt is made to change or affect the tenures of property, the civil rights of thousands are to be changed, and transferred to another government to which they are strangers.

Again, an authority for the grant, by the court, of the object of the complainant's bill, is asked for. Where is the case in which such relief has been sought? Where is the instance in which it has been given? It is true, that on the application of Rhode Island, commissioners have, at different times, been appointed by Massachusetts, and those commissioners have met with commissioners appointed on her part. This is a proper course of proceeding between states. A sovereign state must be heard, whatever may be the subject of her complaint. Subjects in controversy between states are not to be settled without delays and grave consideration. Respect is always to be given to applications by states to other political communities. But with all this courtesy and just regard to the dignity and just right of the state of Rhode Island to be respected, the state of Massachusetts has never receded from the line established by the Woodward and Saffrey station. Those acts of conciliation and *international civility, do not affect the [250 agreements of 1710 and 1721; it being admitted, that the possession of Massachusetts is in exact harmony with them. Thus, in international law, the case is against Rhode Island.

But we are willing to consider the case, as one to be decided by the rules of equity pleading. The complainant's bill would have been bad on a

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demurrer, in a court of equity ; because it sets out a bar to the defendant's case, and does not set out sufficient to destroy it. Possession, in a court of equity, is as certain a title to land, as in a court of law. It is now held, that a party may defend himself in equity, by possession, as well as at law. *Elmendorf v. Taylor*, 10 Wheat. 152. It is to be considered by the court, that everything stated in the plea is true. This is the necessary consequence of the position in which the complainant is placed, by the effort he now makes to show the court the plea is insufficient. It is admitted, the agreements between Rhode Island and Massachusetts of 1710 and 1721, were fair, and were made with full knowledge of the subject of the agreements, or with a full opportunity to obtain such knowledge. Possession accompanied those agreements, and was entirely consistent with them ; and they have never been rescinded or abandoned.

This brings back the argument to the question of mistake. It is said, that the plea shuts out Rhode Island from her proof. But Rhode Island can prove nothing more than she has stated in her bill. Take all that is stated in the bill to be true ; and Massachusetts alleges it is not sufficient to set aside the agreements. This court cannot know more than the commissioners on behalf of Rhode Island, and on behalf of Massachusetts, knew in 1710. The ground of the assertion of mistake is not sufficient to open the controversy. Can controversies be never settled, when parties say there has been a mistake ? 2 Powell on Cont. 90. The unreasonableness of a contract is not a ground to set it aside. Another well-established principle is, that when a thing is doubtful and uncertain, a settlement between the parties is conclusive. Powell on Cont. 125 ; 1 Ves. sen. 408 ; 1 Story's Equity, 163 ; 1 Madd. Ch. Pract. 62-3.

It is said, the defendant has not answered the bill ; but this is the very question before the court. The plea and answer of the defendant are now under examination ; and it will be for the court to decide upon their sufficiency, and whether they will sustain the defendant's claim to be dismissed from any further action in the case. If the party had deemed the plea insufficient, he might have excepted to it, and have brought in other matter. This he has not done ; but he asks the court to decide on the insufficiency of the plea and answer. This is altogether irregular. 1 Story's Equity *251] 528, § 684 ; Mitf. Plead. 200 ; Beames' Eq. 248 ; 1 Vern. 185 ; *Coop. Eq. 284 ; 5 Madd. 328, 330 ; *Allen v. Randolph*, 4 Johns. Ch. 693. What is it that the defendant should have denied ? The rule of a court of equity is, that the plea or answer should deny the final result of all the allegations ; not each particular matter which may in itself be true. The permission which is given to the defendant to deny the whole charge of the bill, is essential to the existence and validity of a plea in bar. Beames' Eq. 37 ; 5 Bro. P. C. 552 ; Gilb. Eq. 184 ; Coop. Eq. 328.

There must be something, not denied by the plea, upon which the court can give a decree for the plaintiff. If there is not enough left undenied, sufficient to make a case for relief or recovery, none can be granted. The plaintiff might allege twenty facts, either quite immaterial, or even, perhaps, material in some degree, or as matter of evidence, which the defendant could not deny. For instance, the complainant avers that Dudley and Jenckes did not go on the ground to examine it. The defendants are not obliged to deny that ; for the agreement may be good, if fair, though the

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fact were as is averred. So, the bill avers the discontent of Rhode Island ; an *ex parte* line having been determined upon. That may be so ; but that does not set aside the agreement. Massachusetts, it is asserted, appointed commissioners to meet commissioners appointed by Rhode Island. That may be so ; but the agreement was in full operation.

Everything alleged to have happened after 1719 is called for, for the purpose of proving some waiver, rescission or abandonment of the agreement. If that were not the design, it had no object. Now, the plea meets and denies the general fact, which all these things are said to prove. Denying the general fact, we need not deny each of the circumstances relied upon as proof. There is a difference in this respect between the case now before the court, and a case where fraud is charged. Any fraud, little or great, vitiates ; every mistake does not. Any one circumstance amounting to fraud, proves fraud. Suppose, the complainant had charged, in direct terms, an abandonment of the agreement of 1710 : it would have been enough for the defendant to have denied the abandonment, in general terms.

TANEY, Ch. J., delivered the opinion of the court.—When this case was last before the court, Massachusetts had not made her election, whether she would continue her appearance to the suit, or withdraw it, according to the leave previously granted. She has since that time made her election, by putting in her plea to the amended bill of the complainant ; and both parties are now regularly before the court.

In the present stage of the case, the question is upon the sufficiency of the plea, as a bar to the relief sought by the complainant's bill. The object of the bill is to establish the boundary between the two states, according to their respective charters ; and to be restored to the right of jurisdiction and sovereignty over that portion of her *territory of which she alleges [*252 that Massachusetts has unjustly deprived her.

The bill states the various charters from the crown to the colonies of Massachusetts and Rhode Island, from 1621 to 1691 ; and avers that, by virtue of the charter of Rhode Island, the boundary between her and Massachusetts was a line run east and west, three miles south of Charles river, or any or every part thereof ; that the place of the said line being unsettled and in dispute between the two colonies, commissioners were mutually appointed to ascertain and settle it ; that these commissioners met in 1710 ; and that the commissioners of Massachusetts then represented that a certain Nathaniel Woodward and Solomon Saffrey had, a long time before, ascertained the point three miles south of Charles river, and had set up a stake there ; and that the commissioners of Rhode Island, relying on these representations, and believing them to be true, entered into the agreement of 1710, which is recited at large in the bill ; and which adopts the place marked by Woodward and Saffrey, as the commencement of the line between Massachusetts and Rhode Island.

The bill further states, that no mark, stake or monument at that time existed ; and that the persons who consented to the pretended agreement, did not go to the place where it was alleged to have been set up, nor make any survey, nor take any measures to ascertain whether the place was, in fact, three miles, and no more, south of Charles river. That the said agree-

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ment was never assented to nor ratified by the colony or the state of Rhode Island ; and that the tract of one mile in breadth, referred to in the agreement, was never conveyed to or enjoyed by the town of Providence, or the colony of Rhode Island ; and that no persons appointed by the governor and council of the said two governments of Massachusetts and Rhode Island, within the space of six months from the date of the agreement, or at any other time, showed the line of Woodward and Saffrey, or raised or renewed any marks, stakes or other memorials, according to terms of the said pretended agreement.

The bill then proceeds to state the continuance of the controversy about the boundary, and the appointment of commissioners by both colonies, in 1717 and 1718 ; that they met in 1718, and that the like representations, as those charged to have taken place at the former meeting of the commissioners, were again made by the commissioners of Massachusetts ; that they were again believed by the commissioners of Rhode Island ; and the agreement of the 22d of October 1718 executed by them under that mistake. This agreement is set out at length. The complainants aver, that the commissioners did not go to the place where the stake was alleged to have been set up, nor make any survey in relation to this agreement. These averments are, in substance, the same with those made in relation to the agreement of 1710. The bill then sets out an order of the general assembly of Rhode Island, directing the return of the commissioners *to be accepted and placed to record on the colony book ; but the complainants aver, that the last-mentioned agreement was never ratified by either Rhode Island or Massachusetts.

The bill then sets out the running of the line, under the belief on the part of the Rhode Island commissioners, that it was only three miles south of Charles river, when it was in fact more than seven ; sets out, at large, their report of the running, which is dated May 14th, 1719, and that the return was approved by the general assembly of Rhode Island ; but the bill avers, that the persons who signed that report, were never authorized by Rhode Island to run, agree upon, or report said line, and had no legal authority to act in the premises ; and that Massachusetts, about the time last mentioned, wrongfully possessed herself of the disputed territory, and has held it ever since.

The bill further states, that the line run as aforesaid was never established by any act binding upon the complainant ; on the contrary, she has always claimed that the true dividing line was three miles south of Charles river ; that she has never acquiesced in the claim of Massachusetts to a different line ; and that the claim of Rhode Island was publicly and frequently urged by the colony, and by the freemen and inhabitants thereof ; that all the proceedings of Rhode Island before mentioned, were founded on the mistaken belief that the stake set up by Woodward and Saffrey, and the line run as aforesaid, was only three miles south of Charles river ; that this mistaken belief continued untill about 1749 ; that controversies existing during that period between the citizens of the two colonies in relation to the boundary, Rhode Island, in the year last mentioned, appointed certain persons to run the line, when it became manifest that the line run as above mentioned in 1719, was more than three miles south of Charles river.

The bill then states the negotiations and other proceedings of the two

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colonies in relation to this boundary ; that commissioners were appointed on both sides to run the line ; that it was actually run, as now claimed by the complainant, by the commissioners of Rhode Island, in the absence of the commissioners of Massachusetts ; who refused to attend. All of these things are particularly set out in the bill ; and also, that Rhode Island attempted to obtain the decision of the king in council ; and the failure is accounted for by the poverty of the colony at that time, and the war which shortly afterwards broke out between France and England ; that the war of the revolution, which soon followed, interrupted and defeated the attempt to obtain the decision of the king in council ; that in 1782, the legislature of Rhode Island again took up the subject, and appointed a committee, who reported in favor of the claim now made by the complainant ; that in 1791, the two states mutually appointed commissioners to adjust this boundary, who met together in that year ; and at that meeting, the commissioners on the part of Massachusetts acknowledged, and also set forth in their report subsequently made to the legislature, that the pretended agreement of 1719, hereinbefore mentioned, had never been ratified either by Massachusetts *or Rhode Island, which report was accepted by the legislature ; that the commissioners of the two states, being unable to [*254 agree upon the boundary, entered into a written agreement, which is set out in the bill, recommending to the two states to submit the matter to indifferent men of the neighboring states ; or to unite in an application to congress to settle the same, agreeable to the respective charters, and the constitution of the United States ; that the said commissioners, in 1792, reported their proceedings to their respective states, and the agreement made by them as aforesaid ; which said reports were received and accepted by the legislatures of Massachusetts and Rhode Island, the one made to Massachusetts being set out at large, as an exhibit to complainant's bill ; that other commissioners were afterwards appointed on both sides, and were continued until the year 1818 ; that they had several meetings, but were unable to agree upon and settle the line.

The bill then charges, that Massachusetts has wrongfully continued to hold possession, and exercise jurisdiction within the charter boundary of Rhode Island ; that the agreements of 1710 and 1718 were unfair and inequitable, and executed by mistake, as before mentioned ; that the line, as run, is not in a west course from the place of beginning, but is south of a west course, thus taking in a part of Rhode Island, even according to the point alleged to have been ascertained and marked by Woodward and Saffrey ; that the agreements of 1710 and 1718, hereinbefore mentioned, were never ratified by Massachusetts or Rhode Island ; and if they had been so ratified by the colonies, they would not have been binding, without the consent of the king in council, which was never given to either of them. And the bill concludes with an averment, that Rhode Island has uniformly resisted the claim of Massachusetts ; has never claimed or admitted any other boundary than the one according to the charter ; and prays for an answer to all the matters charged, and to sundry special interrogatories put in the bill ; and that the northern boundary of the state may be ascertained and established, and Rhode Island restored to the exercise and enjoyment of her rights of jurisdiction and sovereignty over the territory to which she is entitled by her charter limits.

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To this bill, Massachusetts has put in her plea and answer ; in which she sets forth, that in the year 1642, for the purpose of ascertaining and establishing her true southern boundary, a station, or monument was erected at a point then believed to be on the true and real boundary line of the said colony, and a line continued therefrom westwardly to Connecticut river ; that the said station or monument then became, and ever since has been, well known and notorious, and then was, and ever since has been, called Woodward and Saffrey's station ; that Massachusetts afterwards held and possessed jurisdiction up to this line, and while she so held and possessed it, about the year 1709, a dispute arose between the two governments of Massachusetts and Rhode Island, respecting this *boundary line, and com-
 *255] missioners were appointed by both colonies to settle it ; and that whatever they should agree upon, should for ever after be taken to be the stated lines and bounds ; that the commissioners met, pursuant to their authority, and entered into the agreement of 1710, which is set out at large.

The plea then avers, that the whole merits of the complainant's claim was heard, tried and determined by this judgment and agreement of the commissioners ; that the agreement was fair, legal and binding between the parties ; and was in all respects a valid and effectual settlement of the matter in controversy ; and was had and made without fraud, covin or misrepresentation, and with a full and equal knowledge of all the circumstances by both parties ; and that the same is still in full force, no way waived, abandoned or relinquished ; that Woodward and Saffrey's station was then well known, and the place where it was fixed a matter of common notoriety ; and the line run therefrom capable of being shown and ascertained, and the marks, stakes and memorials there, are easily capable of being discovered and renewed ; and that the defendant has held and possessed the land, property and jurisdiction, according to the said station and the line running therefrom, from the date of the said agreement to the present time, without hinderance or molestation. The plea then sets forth the proceedings of Massachusetts and Rhode Island, in 1717, appointing commissioners to settle the boundary ; the meeting of these commissioners, and their agreement in 1718, which is set out at large in the plea ; and which the defendant avers was accepted by Rhode Island, and caused to be duly recorded, and that the same was thereby ratified and confirmed.

The plea further avers, that no false representations were made on this occasion by the commissioners of Massachusetts ; that the agreement was concluded in good faith, with a full and equal knowledge of all the circumstances, by the respective parties ; and that the same has never been rescinded or abandoned ; that it was made in pursuance of the first agreement before mentioned, in 1709, and in completion thereof ; the plea then sets out at large, the report made by the commissioners in 1719, stating the manner in which the line was run ; and avers that the report was approved by the general assembly of Rhode Island, on the 16th of June 1719 ; and that from the date of said agreement to the present time, Massachusetts has possessed all the territory, and exercised jurisdiction over the same, north of the said line, as prescribed in the said agreement of October 1718, without hinderance or molestation. The plea then says, "and the said

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defendant doth plead the said agreement of January 19th, 1710 ; and the said agreement in pursuance and confirmation thereof of the 22d of October 1718, and unmolested possession according to the same, from the date of the said agreements, in bar to the whole bill of complaint of the said complainant, and against any other or further relief therein ; and doth pray the judgment of the court, whether the said defendant *ought further to answer the said bill, and that said defendant may be dismissed with [*256 costs in this behalf sustained." Then follows an answer in support of the plea, which is unnecessary to repeat.

The plea was set down for argument, upon the motion of the complainant ; and the question now to be decided is, whether this plea is a bar to the complainant's bill.

In the view we have taken of the subject, it has become necessary to set out, in much detail, the contents both of the bill and the plea, in order to show the principles on which the opinion of the court is founded. The controversy concerns altogether the southern boundary of Massachusetts, and the northern boundary of Rhode Island. The bill sets out the judgment given in 1684, in the court of chancery of England, declaring the original charter of Massachusetts to be vacated, and that the enrolment of the same should be cancelled ; and also sets forth the letters-patent afterwards granted to Massachusetts by William & Mary, in 1691, which was subsequent to the charter of Rhode Island. How far this fact may or may not be material, it would not be proper for us now to inquire. We advert to it, merely to show the character of the controversy. The complainant insists in her bill, that Massachusetts has encroached upon her ; and instead of coming three miles south of Charles river, for the southern line, the one to which she claims and holds is more than seven. The defendant, it will be observed, does not, in her plea, deny that the charter line of Massachusetts is such as the complainant describes ; nor does the defendant deny, that the line to which Massachusetts now holds, and to which she insists that she has a right to hold, is four miles further south than that described in the charter ; but she relies upon the circumstances set forth in her plea and answer, as conclusive proofs of her right, as against the complainant, at this time, whatever may have been the true boundary line between them, according to the terms of the original charters.

The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a court of justice ; and we have no precedents to guide us in the forms and modes of proceedings, by which a controversy of this description can, most conveniently, and with justice to the parties, be brought to a final hearing. The subject was, however, fully considered at January term 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion, the court determined to frame their proceedings according to those which had been adopted in the English courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And acting upon this principle, it was then decided, that the rules and practice of the court of chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded, is fully stated in the

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opinion then delivered; *and upon re-examining the subject, we are quite satisfied as to the correctness of this decision. (12 Pet. 735, 739.)

The proceedings in this case will, therefore, be regulated by the rules and usages of the court of chancery. Yet, in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the court to mould the rules of chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of chancery pleading. And if it appears, that the plea put in by the defendant may in any degree embarrass the complainant in bringing out the proofs of her claim, on which she relies, the case ought not to be disposed of on such an issue. Undoubtedly, the defendant must have the full benefit of the defence which the plea discloses; but at the same time, the proceedings ought to be so ordered as to give the complainant a full hearing upon the whole of her case. In ordinary cases between individuals, the court of chancery has always exercised an equitable discretion in relation to its rules of pleading, whenever it has been found necessary to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength.

According to the rules of pleading in the chancery court, if the plea is unexceptionable in its form and character, the complainant must either set it down for argument, or he must reply to it, and put in issue the facts relied on in the plea. If he elects to proceed in the manner first mentioned, and sets down the plea for argument, he then admits the truth of all the facts stated in the plea, and merely denies their sufficiency, in point of law, to prevent his recovery. If, on the other hand, he replies to the plea, and denies the truth of the facts therein stated, he then admits that if the particular facts stated in the plea are true, they are then sufficient in law to bar his recovery: and if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. 6 Wheat. 472. Undoubtedly, if a plea, upon argument, is ruled to be sufficient in law to bar the recovery of the complainant, the court of chancery would, according to its uniform practice, allow him to amend; and to put in issue, by a proper replication, the truth of the facts stated in the plea. But in either case, the controversy would turn altogether upon the facts stated in the plea, if the plea is permitted to stand. It is the strict and technical character of these rules of pleading, and the danger of injustice often arising from them, which has given rise to the equitable discretion always exercised by the court of chancery in relation to pleas. In many cases, where they are not overruled, the court will not permit them to have the full effect of a plea; and will, in some cases, save to the defendant the benefit of it at the hearing; and in others, *will order it to stand *258] for an answer, as in the judgment of the court may best subserve the purposes of justice.

In the opinion of this court, it was evident from the argument we have heard, that if the plea stands, the case must be finally disposed of, upon an issue highly disadvantageous to Rhode Island. For by setting down the

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plea for argument, that state is compelled to admit the truth of all the facts stated in it, many of which are directly at variance with the allegations contained in the bill. Thus, for example, the complainant avers, that the persons who signed, in her behalf, the agreement of May 14th, 1719, had no legal authority to act in the premises ; in the plea and answer of the defendant, it is averred, that they had authority. The bill charges, that the Rhode Island commissioners acted under a mistake ; that the commissioners of Massachusetts represented to them that the stake set up by Woodward and Saffrey was only three miles south of Charles river ; and that they believed the representation, and acted upon it, when in truth the stake was seven miles south of that river ; the plea, on the contrary avers, that the agreement was made with a full and equal knowledge of all the circumstances by the respective parties. There are differences also between the bill and the plea, in relation to the nature and character of the possession held by Massachusetts of the disputed territory.

If we proceed to decide the case upon the plea, we must assume, without any proof on either side, that the facts above mentioned are correctly stated in the plea, and incorrectly set forth in the bill. This is the rule of the chancery law. Yet it is evident, that by deciding the case upon such an issue, we should shut out the very gist of the complainant's case ; and exclude the facts upon which her whole equity is founded, if she has any. Because, if we assume, as we must do, in this state of the pleading, that the agreements, which are admitted on both sides to have been made, were made by persons having competent authority to make them, and who had full knowledge of all the circumstances ; and that Massachusetts had quietly and peaceably enjoyed the territory, under this agreement, for more than a century ; every one, we presume, would admit, that the claim of Rhode Island to unsettle this boundary, at this late day, was utterly groundless and untenable. Yet this is the attitude in which Rhode Island must stand, upon the issue framed by the plea ; the allegations in her bill, above mentioned, must be rejected as erroneous, without giving her an opportunity of proving them ; and her claim to this territory must be decided, upon a statement of facts, the truth of which she utterly denies, and which she offers to prove are entirely erroneous, if the court will consent to hear her testimony. We do not mean to say, that the facts stated in the bill, if proved to be true, will entitle the complainant to recover. That point is not before us, in the present state of the pleadings ; and we give no opinion on the merits of this controversy. But certainly it would be unjust to the complainant, not to give her an opportunity of being *heard, according to the real state of the case between the parties ; and to shut out from consideration the very facts upon which she relies to maintain her suit. [*259]

If the complainant takes issue on the facts stated in the plea, her condition would be equally unfavorable. For there are many facts upon which the complainant evidently relies as material, which are altogether unnoticed in the plea, and upon which, therefore, no issue would be framed. And if the complainant were to adopt this alternative, she would admit, according to the chancery rules of pleading, that all of the allegations contained in her bill were immaterial and of no importance, except those noticed in the plea ; and that if the facts averred in the plea turned out to be true, the complain-

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ant had no right to recover, whatever equities might be found in the other allegations in the bill ; and whatever proofs she might be ready to adduce in support of these allegations. In either alternative, therefore, it would be manifestly unjust to the complainant, to decide this controversy upon the plea ; and if it was deemed good in form and substance, so far as the case is already presented to the court, we still should not finally decide the controversy on this plea, but save the benefit of it to the hearing, and give the complainant as well as the defendant, the opportunity of bringing forward all the merits of his case.

But the plea put in by the defendant cannot be sustained, even if this were to be treated as a suit between individuals, and tried by the ordinary rules of chancery pleading. It is multifarious, and on that account ought to be overruled. It is a general rule, that a plea ought not to contain more defences than one. Various facts, therefore, can never be pleaded in one plea, unless they are all conducive to a single point, on which the defendant means to rest his defence. This principle is so well established, that it is unnecessary to refer to many adjudged cases to support it. It is fully stated by Lord HARDWICKE, in 1 Atk. 54, in the following words : "The defence proper for a plea, must be such as reduces the cause to a particular point, and from thence creates a bar to the suit, and is to save the parties expense in examination ; and it is not every good defence in equity that is likewise good as a plea ; for where the defence consists of a variety of circumstances, there is no use of a plea ; the examination must still be at large, and the effect of allowing such a plea, will be, that the court will give their judgment on the circumstances of the case, before they are made out by proof."

The defendant, after stating the various proceedings hereinbefore mentioned, which preceded and followed the execution of the agreements on which he relies, all of which conduce to a single point, that is, to show the obligatory and conclusive effect of those agreements upon both of the states, as an accord and compromise of a disputed right, deliberately made, and with full knowledge on both sides ; proceeds to aver, "that the defendant has occupied and exercised jurisdiction, and enjoyed all rights and sovereignty, according *to the same, from the date hereof to the present *260] time." And he then sums up his defence in the following words : "And the said defendant doth plead the said agreement of the 19th January 1710, and the said agreement in pursuance and confirmation thereof, of the 22d October 1718, and unmolested possession, according to the same, from the date of the said agreements, in bar to the whole bill of complaint of the said complainant ; and against any further or other relief therein."

The defence set up by this plea is twofold : 1. That there was an accord and compromise of a disputed right : 2. Prescription, or an unmolested possession from the time of the agreement, that is, of more than one hundred years. These two defences are entirely distinct, and depend upon different principles. If what the defendant alleges be true, then the agreements themselves conclude the controversy. For if, as the plea avers, there was a dispute between these two colonies, in respect to the boundary between them, and that dispute was settled by persons duly authorized to bind the respective parties ; and if, as stated in the plea, the agreement of

October 1718, to run the line from the stake set up by Woodward and Saffrey, was accepted, ratified and confirmed by Rhode Island ; and if the running of the line afterwards, in 1719, pursuant to such agreement, was also approved by Rhode Island ; then there can no longer be any controversy between them. They must, on both sides, be bound by the accord and compromise of those whom they had authorized to bind them, and whose conduct they afterwards approved ; provided the settlement was made, as the plea alleges, with a full and equal knowledge of all the circumstances. The various facts stated by the defendant, in relation to these agreements, contribute to support them, and conduce to establish this point of his defence. And assuming that the plea and answer are true in all these statements, then an accord and compromise is established, which was obligatory upon the parties, from the moment it was finally ratified. And taking everything averred by the defendant on this point of the defence to be correct, Rhode Island would have been as effectually barred as she is at the present moment, if she had commenced this controversy within a month after the accord was made. The lapse of time is not at all necessary to give validity to such a settlement, or to support the defence founded upon it. It is a matter entirely distinct from it ; and if it has any operation in the cause, it is another defence, and one of a different character. It is not an accord and compromise of a doubtful right—it is prescription.

Rhode Island, indeed, avers, that the possession was constantly disputed on her part, and efforts made from time to time to regain it ; and that it has always been an open question, since the error in the line was first discovered, down to the present time. But as we have already remarked, when the plea is set down for argument, the statements contained in it are admitted to be true. And according to the allegations there made, this long possession was unmolested. In that state of the fact, separated from all the averments *of Rhode Island, the possession of more than one hundred years would become a rightful one by prescription, even if [*261 it had begun in wrong and injustice. The acquiescence of the adjoining state for such a lapse of time, would be conclusive evidence, that she assented to the possession thus held, and had determined to relinquish her claims. The possession, therefore, if a defence at all, is a separate and complete one of itself ; and forms no part of the accord and agreement alleged in the plea. Here, then, are two defences in the same plea, contrary to the established rules of pleading.

A few cases will illustrate these principles, and show what constitutes duplicity in pleading. In the case of *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, where, to a bill for a specific performance of an agreement, the defendant put in a plea which averred two facts, first, that there was no agreement in writing, and secondly, that there had been no acts done in part performance ; Lord THURLOW overruled the plea as double, it containing two different points, and therefore, proper for an answer. And in delivering his opinion on that occasion, he says, “the use of a plea here is to save time, expense and vexation ; therefore, if one point will put an end to the whole cause, it is important to the administration of justice that it should be pleaded ; but if you are to state many matters, the answer is the most commodious form to do it in.” We are aware, that this decision has been questioned. But it is quoted with approbation, and recognised as authority, in

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7 Johns. Ch. 216 ; where Chancellor KENT, speaking of the case of *Whitbread v. Brockhurst*, says, "the reasoning of Lord THURLOW is supposed to be weighty and decisive ; and since that time, it has been the constant language of the court, that the plea must reduce the defence to a single point, and that a defendant can never plead double."

Again, in the case of *Claridge v. Hoare*, 14 Ves. 65-6, Lord ELDON, in speaking of the case of *Beachcroft v. Beachcroft*, where it had been held, that the plea of a release, with an averment that it had been acted upon, was multifarious, expressed his doubts of that decision, upon the ground, that the release was effectual, without being acted upon, and the latter averment might have been rejected as surplusage. The reasoning of Lord ELDON shows, that if the second averment would have been a good point of defence, the plea would have been bad. The acting upon the release, in *Beachcroft v. Beachcroft*, was altogether unimportant, and could not, if true, affect the rights of the parties. But not so, as to the possession here pleaded. If true, as pleaded, it is of itself a defence, and could not, therefore, be rejected as surplusage. The case of the *Corporation of London v. Corporation of Liverpool*, 3 Anstr. 738, also illustrates and supports the principle we have stated. It is unnecessary, however, to multiply cases on this subject. They are all collected together in Story's Equity Pleading, where the subject is very fully examined. We hold it to be perfectly clear, that in the case of an individual, the plea of a release and of the statute of

*262] limitations, or of an award and the statute of limitations, could not be united in the same plea. And if so, it would seem irresistibly to follow, that the accord and compromise, and the title by prescription, united in this plea, render it multifarious ; and that it ought to be overruled on that account.

We have carefully avoided expressing any opinion upon the merits of this controversy ; and have confined ourselves to the case as presented to the court by the pleadings. The facts stated in the bill, and not noticed in the plea, are not yet admitted or denied ; and consequently, we do not know in what form the case may ultimately come here for decision.

In the case of *Rowe v. Teed*, 15 Ves. 377-8, Lord ELDON remarks, that "the office of a plea, generally, is not to deny the equity, but to bring forward a fact, which, if true, displaces it." A plea, therefore, in general, presupposes that the bill contains equitable matter, which the defendant by his plea seeks to displace. It is according to this principle of equity pleading, that we have treated the case before us. If a defendant supposes that there is no equity in the bill, his appropriate answer to it is a demurrer ; which brings forward at once the whole case for argument. The case of *Milligan v. Milledge*, 3 Cranch 220, 228, illustrates this rule, and shows that the defence here taken was more proper for an answer or demurrer than a plea.

The course determined on recommends itself strongly to the court, because it appears to be the only mode in which full justice can be done to both parties. Each will now be able to come to the final hearing, upon the real merits of their respective claims, unembarrassed by any technical rules. Such, unquestionably, is the attitude in which the parties ought to be placed in relation to each other. If the defendant supposes that the bill does not disclose a case which entitles Rhode Island to the relief she seeks, the whole subject can be brought to a hearing by a demurrer to the bill. If it is sup-

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posed, that any facts are misconceived by the complainants, and therefore, erroneously stated, the defendants can put these in issue by answering the bill. The whole case is open; and upon the rule to answer which the court will lay upon the defendant, Massachusetts is entirely at liberty to demur or answer, as she may deem best for her own interests.

MCLEAN, Justice.—The Massachusetts charter was granted by King Charles I., and is dated the 4th March 1628. It conveyed to Sir Henry Rosewell and others, “all that part of New England, in America, which lies and extends between a great river, there commonly called Monomack, *alias* Merimac, and a certain other river called Charles river, &c.; and also all and singular those lands and hereditaments whatsoever, lying within the space of three English miles on the south part of the said Charles river, or of any or every part thereof,” &c. *On the 8th July 1663, King Charles II. granted the charter of Rhode Island, “bounded on the [*263 west, or westerly, to the middle or channel of a river there, commonly called and known by the name of Pawcatuck river, and so along the said river, as the greater or middle stream thereof reaches or lies up into the north country, northward, unto the head thereof, and from thence, by a straight line drawn due north, until it meets with the south line of the Massachusetts; and on the north, or northerly, by the aforesaid south or southerly line of the Massachusetts colony or plantations,” &c.

The line which limits Massachusetts on the south, and Rhode Island on the north, is the subject matter of controversy in this case. The bill states, that for many years after the Rhode Island charter was granted, the northern part of the colony, adjoining Massachusetts, remained wild and uncultivated; and the land was of little value; that a short time previous to the year 1709, a dispute arose respecting the northern boundary; and that Massachusetts appointed one Joseph Dudley on her part, and the general assembly of Rhode Island appointed and empowered one Joseph Jenckes on her part, to ascertain and settle the disputed line; that these persons met, together with one Nathaniel Paine, one Nathaniel Blagrove, and one Samuel Thaxter, of Massachusetts; and one Jonathan Sprague, and one Samuel Wilkinson, of Rhode Island; at Roxbury, in Massachusetts, the 19th January 1710; and that the said Joseph Dudley, Nathaniel Paine, Nathaniel Blagrove and Samuel Thaxter represented to the said Jenckes, Sprague and Wilkinson, that one Nathaniel Woodward and one Solomon Saffrey, who, they also represented to be skilful and approved artists, had, before that time, that is to say, in 1642, ascertained the point or place, three English miles south of the river called Charles river, or of any or every part thereof, and had there set up a stake; and that Jenckes, Sprague and Wilkinson, relying on their representations, and believing the point or place to have been ascertained, and that it was three English miles, and no more, south of Charles river, or of any or every part thereof; the said Dudley and Jenckes, in the presence of, and with the advice of, the other persons named, signed and sealed a certain writing, called an agreement, that the boundary should be run from the stake set up by Woodward and Saffrey.

And the complainant states, that no stake or monument at that time existed, by which could be ascertained the place where it was set up by Woodward and Saffrey; that the agreement was entered into without going

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to the place of beginning, and without ascertaining whether it was not more than three miles south of Charles river; and whether the line was run as stated in the agreement. That neither the colony, nor the state of Rhode Island, has ever assented to or confirmed the agreement; nor has the town of Providence, nor the colony, enjoyed the tract of land specified in the agreement, of one mile in breadth, north of Woodward and Saffrey's line; *264] that this line was not shown nor run in six months after the *agreement; nor were any marks, stakes or other memorials made, to identify the place of beginning.

That this controversy respecting the line continued; and that Massachusetts, on the 18th June 1717, enacted an order, in the words following: "The season of the year having been such, this spring, that the committee appointed in November last, to run the line between this government and the government of Rhode Island, could not attend the service: Ordered, that the honorable Nathaniel Paine, Esquire, Samuel Thaxter, Esquire, and John Chandler, Esquire, be a committee, to join with such as the said government of Rhode Island shall empower, to proceed in and perfect the running and settling the line between this province and the said colony, pursuant to the agreement lately made for that end by commissioners of both governments," &c. And on the 16th November 1717, the general court of Massachusetts resolved, that Nathaniel Blagrove, Esquire, be added to the committee. And afterwards, the general court resolved, that "whereas, this house is informed, that the government of Rhode Island have fully empowered the committee which they have appointed, to run the line between this province and that government; to agree, compromise and issue the governments on that affair, and finally settle the dividing boundary: Resolved, that if the said committee shall attend that service, so empowered, that the committee appointed by this court to join in running the said line, be also vested with like powers; and are hereby fully empowered to agree, compromise and issue the difference between the governments in the said affair; and to make a full and final settlement of the line between that government and this."

That on the 17th June 1718, the assembly of Rhode Island passed the following act: "Whereas, the committee appointed and empowered by the general assembly of this colony, at their sessions on the first Wednesday of May 1717, to perfect and settle the line between the said colony and the province of Massachusetts Bay, were bound up or restricted to an agreement made at Roxbury between Colonel Dudley and Major Jenckes, &c., so as the matter in difference between the two colonies, as to the stating and settling the said line hath been retarded, to the considerable charge of the colony, this assembly, taking the premises under consideration, do hereby, enact, constitute and appoint Major Joseph Jenckes, Major Randal Holding, Major Thomas Fry, Captain Samuel Wilkinson and Mr. John Mumford, surveyor, a committee, to treat and agree with such gentlemen as are or may be appointed and commissioned by Massachusetts to settle the line," &c. That on the 2d October 1718, the commissioners on both sides met at Rehoboth, and after discussing the subject, entered into an agreement under their hands and seals, "that the stake set up by Woodward and Saffrey, in 1642, upon Wrentham plain, be the station or commencement of the line," &c.

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The complainant alleges, that this agreement was also entered into without examination of the place where the stake was originally set *up; and without ascertaining whether the place was not more than [*265 three English miles south of Charles river, or of any or every part thereof. That the Rhode Island commissioners believed the statements made to them on this subject, by the commissioners of Massachusetts. The Rhode Island commissioners made a return of their proceedings to their legislature; who accepted it, and ordered it to be recorded.

On the 12th May 1719, the commissioners on both sides ran the line, beginning at the place where it was supposed the stake had been erected by Woodward and Saffrey; but which stake was not found, and was more than seven miles from Charles river, or any or every part thereof. The commissioners made a return of their survey, which was received and approved of by the legislature of Rhode Island. But the complainant alleges, that the persons making the survey were not authorized to act in the premises by Rhode Island. And the bill states the line was never confirmed by Rhode Island; that the colony maintained that the true line was to begin three miles south of Charles river; and the complainant avers, that all the above proceedings and agreements were founded upon the belief that the point or place three English miles south of Charles river, or of any or every part thereof, had been correctly and truly ascertained by Woodward and Saffrey.

In the year 1750, the general assembly of Rhode Island passed an act authorizing the boundary line to be run, and appointing certain persons to perform this duty. In the preamble to this act, it is stated, that the line never has been settled and run, according to the royal charter; and that divers persons have set forth their rights to the assembly to be under the jurisdiction of Rhode Island, instead of that of Massachusetts. The commissioners appointed by this act were authorized to meet any commissioners appointed by Massachusetts, and to settle the boundary and run the line. But if Massachusetts should decline to act, then the Rhode Island commissioners were required to run the line, agreeable to the charter, and make return of their proceedings. It is stated in the bill, that commissioners were appointed by Massachusetts, but they declined to meet the commissioners of Rhode Island; who, after waiting two days near the place of beginning, proceeded, *ex parte*, to run the line, and make return thereof. This report was accepted by the assembly, and the commissioners were continued in office. The bill then states, that the Massachusetts commissioners, appointed as above, made a report of their proceedings to the council, the 13th April 1750.

The bill further states, that remonstrances were made to Massachusetts, against its exercise of jurisdiction over the country within the chartered limits of Rhode Island, so long as the royal government continued; that unsuccessful attempts were made to bring the subject before the king in council; but the population of Rhode *Island being small, and her [*266 means limited, and war between England and France having soon after taken place, interposed insurmountable obstacles. In the year 1782, on the petition of a large number of the inhabitants residing within the controverted limits, the assembly of Rhode Island made a report in favor of its claim.

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In the year 1791, the bill states, the legislature of Massachusetts passed an act, duly appointing Walter Spooner, Elisha Mayard and David Cobb, commissioners for ascertaining the boundary line between the said state of Massachusetts and the state of Rhode Island; and that in the same year, the Rhode Island assembly passed an act, appointing William Bradford, Jabez Bowen and Moses Brown, commissioners for ascertaining the boundary. These commissioners met at Wrentham, in Massachusetts, in 1791, but they could not agree on the line. They, however, agreed, in writing, to measure from Charles river three miles south, as claimed by each state, as the place of beginning; and to recommend to their respective governments to have the dispute adjudged, by a reference of it to disinterested persons, or by application to congress. These commissioners reported their proceedings to their respective states. And the bill further states, that in the year 1809, the parties again appointed commissioners, who continued in office until 1818; but they were not able to settle the line.

The state of Massachusetts pleads in bar to the bill, that in 1642, for the purpose of ascertaining and establishing the true southern boundary line of the colony of Massachusetts, a station or monument was erected and fixed at a point then taken and believed to be on the true and real boundary line of said colony; and a line continued therefrom, westerly, to Connecticut river; which said monument or station, then became, and ever since has been, well known and notorious; and then was, and ever since has been, called Woodward and Saffrey's station, on Wrentham plains; and after fixing of said station and running the line aforesaid, and after the granting of the charter of Rhode Island, and while all the territory north of said station and line was claimed, held and possessed, and jurisdiction over the same exercised and enjoyed, by Massachusetts, as parcel of her own territory, viz., in the year 1709, disputes having arisen between the two governments respecting the said boundary line, under an act of the assembly, the governor of Rhode Island colony appointed Major Joseph Jenckes to meet with his excellency, Colonel Joseph Dudley, governor of Massachusetts, to settle the boundary; and it was declared, that what they should agree upon should be for ever after deemed the true boundary. These persons met at Roxbury, in January 1710-11, and after a full discussion of the subject, agreed, that "the stake set up by Nathaniel Woodward and Solomon Saffrey, skilful and approved artists, in the year 1642, and since that often renewed, in the latitude of forty-one degrees and fifty-five minutes, being three English miles distant southward, from the southern-
*267] most part of the river called *Charles river, agreeably to the letters-
patent for the Massachusetts province, be allowed on both sides the commencement of the line between the Massachusetts and the colony of Rhode Island, and to be continued between the two governments, &c., as is deciphered in the plan and tract of that line by Nathaniel Woodward and Solomon Saffrey, now shown forth to us, and is remaining on record in the Massachusetts government."

"And whereas, upon presumption, by mistake or ignorance of that line, the inhabitants of the town of Providence, in the colony of Rhode Island, have surveyed and laid out several lots and divisions of land to the northward of Woodward and Saffrey's line aforesaid, on the Massachusetts side; it is agreed, that there shall be and remain unto the said town of Provi-

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dence, and inhabitants of the government of Rhode Island, a certain tract land, of one mile in breadth, to the northward of said line, as described and platted; beginning from the great river of Pawtucket, and so to proceed at the north side of the said patent line, of equal breadth, until it come to the place where Providence west line cuts the said patent line, supposed to contain five thousand acres, be the same more or less; the soil whereof shall be and remain to the town of Providence, or others, according to the disposition thereof to be made by the government of Rhode Island aforesaid. Nevertheless, to continue and remain within the jurisdiction of Massachusetts." "And it was agreed, that persons to be appointed respectively by the two governments, should attend the first good season, within six months, to show the ancient line of Woodward and Saffrey, and to raise and renew the marks and memorials of the same."

This agreement was signed and sealed by Dudley and Jenckes, in the presence and by the advice of Nathaniel Paine, Nathaniel Blagrove and Samuel Thaxter, on the part of Massachusetts; and by Jonathan Sprague and Samuel Wilkinson, on the part of Rhode Island. "And the said defendant avers, that the whole real and true merits of said complainant's supposed cause or causes of action, were fully heard, tried and determined by the said Jenckes and Dudley; that the said agreement was fair, legal and binding between the parties; and was in all respects and all particulars, a valid and effectual settlement of the matter in controversy, and was had and made without covin, fraud or misrepresentation; and with a full and equal knowledge of all circumstances, by both parties." And the plea further avers, that the 18th June 1718, in order to perfect and complete the running and settling of the line in pursuance of the above agreement, Nathaniel Paine, Samuel Thaxter and John Chandler, were appointed a committee by Massachusetts, to which was afterwards added the name of Nathaniel Blagrove, to unite with a committee that should be appointed by Rhode Island for that purpose. And they were fully empowered to agree and compromise the dispute. And Rhode Island adopted in its assembly *the following act: "Whereas, the committee appointed and empowered by the general assembly of this colony, in May 1718, to perfect and settle the line between the said colony and that of Massachusetts, were bound up or restricted to an agreement made at Roxbury between Colonel Dudley and Major Jenckes, &c., so as the matter in difference between the two colonies, as to the stating and settling the said line, hath been retarded, &c. And the assembly hereby enact, constitute and appoint Major Joseph Jenckes, Major Randal Holding, Major Thomas Fry, Captain Samuel Wilkinson and Mr. John Mumford, surveyor, a committee, to treat and agree with the committee of Massachusetts; and full power was given to settle and compromise the controversy respecting the line. The said committees having met at Rehoboth, in Massachusetts, entered into an agreement under seal, that the stake set up by Woodward and Saffrey in 1642, upon Wrentham plains, be the station from which to begin the line which shall divide the two governments," &c. This agreement, on the 29th October 1718, was accepted by the general assembly of Rhode Island, and recorded; and was thereby certified and confirmed by the same. And the plea avers, that said Paine, Blagrove and Thaxter, or either of them, made no false representation whatsoever to the commissioners of Rhode Island; but that the agree-

ment was done and concluded fairly and in good faith, with a full and equal knowledge of all the circumstances, by the respective parties.

The plea states that the Massachusetts commissioners made a report of their proceedings, in regard to the place of beginning and the running of the line, which was approved by the legislature. And that from the date of said agreements to the present time, Massachusetts has possessed and enjoyed all the territory, and exercised jurisdiction over the same, north of the said line; and that the place where the stake was set up by Woodward and Saffrey is well known, and has ever been notorious, since the stake was set up. And the aforesaid agreements, and the unmolested possession according to the same, are pleaded in bar.

And the defendant, not waiving said plea, pleaded as aforesaid, but relying and insisting on the same, by way of answer, in support of said plea, and to everything alleged in said bill to show that the said agreements ought not to stand, and be allowed as good and conclusive against the parties, and a valid and effectual bar, &c., saith, that the said agreements, &c., were fair and legal, obtained without fraud or misrepresentation, and with a full and equal knowledge of all circumstances in both parties; and that it was a valid and effectual settlement of the matter in controversy; and that it never has been in any way rescinded, abandoned or relinquished.

This case having assumed the forms of a chancery proceeding, the established rules of chancery pleading must govern it. In this mode, the points for decision are raised; but the court, in deciding the questions involved, *269] may apply principles of the common law, of chancery, or of national law, as they shall deem the circumstances of the case require.

The plea sets up certain agreements in bar of the relief prayed for, which substantially appear upon the face of the bill; and it is insisted, that in such case, a demurrer, and not a plea in bar, is the proper mode of defence; that the great object of the bill is to set aside these agreements; and that, under such circumstances, they cannot be pleaded in bar. On general principles, it would seem to be unreasonable, that the complainant, by stating the matter in bar in his bill, should prevent the respondent from pleading it. And such is not the established rule in chancery pleading. A plea is a special answer to the bill, and generally sets up matter in bar, which does not appear in the bill; but this is not always the case. An award may be pleaded to a bill to set aside the award and open the account. *Mitf.* 260; 2 *Atk.* 501; 3 *Ibid.* 529, 644. If the plaintiff, or a person under whom he claims, has released the subject of his demand, the defendants may plead the release in bar of the bill; and this will apply to a bill praying that the release may be set aside. *Mitf.* 261; 1 *Atk.* 294; 6 *Madd.* 166; 2 *Sch. & Lef.* 721; 3 *P. Wms.* 315. If a bill be brought to impeach a decree, on the ground of fraud used in obtaining it, the decree may be pleaded in bar of the suit. 3 *Bro. P. C.* 558; 2 *Eq. Cas. Abr.* 177; 7 *Vin. Abr.* 398; 3 *P. Wms.* 95. These authorities show, that a plea in bar may embrace matters stated in the bill. Where the matters in defence are fully stated in the bill, and it contains no allegations which it is necessary to deny by a plea, and by an answer in support of the plea, a demurrer should be filed.

A question in this case is made, whether the plea is not multifarious, and, consequently, bad? The rules which govern a special plea at law, are sub-

stantially the same as apply to a plea in chancery. It must be single, and not double. Its office is, to bring forward a fact, which may be the result of a combination of circumstances; and which, if true, bars the relief prayed for in the bill. 15 Ves. 377. A plea, in order to be good, must be either an allegation or a denial of some leading fact, or of matters which, taken collectively, make out some general fact, which is a complete defence. Story's Eq. Pl. 497; 4 Sim. 161; 7 Johns. Ch. 214; Beames' Pl. in Eq. 10. But although a defence offered by way of plea should consist of a great variety of circumstances, yet, if they all tend to a single point, the plea may be good. Thus, a plea of title derived from the person under whom the plaintiff claims, may be a good plea, though consisting of a great variety of circumstances; for the title is a single point, to which the cause is reduced by the plea. So, a plea of conveyance, fine and non-claim, would be good, as amounting to one title. Coop. Eq. Pl. 225; *Beames' Pl. in Eq. 18; [*270 Mitf. Eq. Pl. 296. The result of all the authorities is, that various facts may be pleaded, if they conduce to a single point, on which the defendant means to rest his defence. And by this rule the plea in this case must be tested.

The defendant pleads in bar to the right asserted in the bill, the establishment of the Woodward and Saffrey station, as the place where the contested boundary line is to commence, and from which it was in fact run. And to support this, the agreements of 1710 and 1718 are relied on, and also the unmolested possession according to the same. These agreements, and the unmolested possession according to them, are facts and circumstances which conduce to prove the right or title asserted in the plea. They are consistent with each other; and can, in no correct sense, be considered as tending to establish distinctive grounds of title. The two agreements are substantially the same; and the unmolested possession, according to the agreements, is a consequence which naturally follows, and tends very strongly to confirm them. The important fact asserted in the plea is, that the controversy was amicably adjusted between the parties, by the establishment of the line; and there is not a fact or circumstance averred in the plea, which does not go to support this main fact. This plea then cannot be multifarious. The point relied on is single and distinct, although it is established by a variety of facts and circumstances.

Mere surplusage will not render a plea multifarious or double. Beames' Pl. in Eq. 19, 20. In Story's Eq. Pl. § 653, n. 3, it is remarked, what constitutes duplicity or multifariousness in a plea, is sometimes a matter of great nicety, upon the footing of authority. A plea cannot contain two distinct matters of defence; for, if more than one defence be admitted, it is well observed, there may be as many grounds of defence stated in a plea as in an answer; and this would defeat the object of the plea. Where, in a bill praying a conveyance for four estates, the defendant put in a plea of a fine as to one estate, and in the same plea, he put in a disclaimer as to the other estates, the plea was overruled; for the disclaimer was wholly disconnected with the plea of the fine, and the plea was, therefore, double. Facts, inconsistent with each other, cannot be pleaded, for this would set up two defences. But where the facts, however numerous, all conduce to establish one point, as in the plea under consideration, it is not multifarious. Story's Eq. Pl. 499. This plea goes to the whole bill, and the matter in bar is clearly and

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distinctly averred. These averments must be sufficient to support the plea, and exclude intendments against the pleader. 2 Ves. 245 ; 2 Sch. & Lef. 727 ; 18 Ves. 182.

The defendant has filed an answer in support of his plea, and this is necessary where there are equitable circumstances stated in the bill, in favor of the plaintiff's case, against the matter pleaded. These allegations in the bill must be denied by way of answer, as *well as by averments in *271] the plea. 6 Ves. 594 ; 2 Ves. & B. 364. In such case, the answer must be full and clear, or it will not be effectual to support the plea ; for the court will intend the matters so charged against the pleader, unless they are fully and clearly denied. But if they are, in substance, fully and clearly denied, it may be sufficient to support the plea ; although all the circumstances charged in the bill may not be precisely answered. Mitf. 298-9 ; 2 Atk. 241 ; 1 Sim. & Stu. 568 ; 5 Bro. P. C. 561. The answer goes to the whole bill, and it denies all fraud, misrepresentation or unfairness ; and every allegation in the bill which goes to show that the agreements set forth in the plea should not be binding and conclusive on the parties.

A question is made, whether this answer, which goes to the whole bill, and denies the same facts as are denied in the plea, does not overrule the plea. This objection seems to derive some support from certain decisions made in the exchequer, and which have been, somewhat loosely, copied into some of the elementary treatises on chancery pleading. But these decisions have never been sanctioned by the high court of chancery in England ; whose rules of practice have been adopted by this court. The rule is, that the answer must not be broader than the plea ; but must, in support of the plea, deny fraud and all equitable circumstances alleged in the bill, which are also by a general averment denied by the plea. The answer, when filed in support of the plea, forms no part of the defence. It is evidence which the plaintiff has a right to require, and to use to invalidate the defence made by the plea. 6 Ves. 597. In a note in Mitf. 240, it is said, "that in the cases in the court of exchequer, it seems to have been supposed, that the answer in support of the plea overruled the plea. But an answer can only overrule a plea, where it applies to matter which the defendant, by his plea, declines to answer ; demanding the judgment of the court whether, by reason of the matter stated in the plea, he ought to be compelled to answer so much of the bill." If the plea goes only to a part of the bill, and prays the judgment of the court whether he shall be compelled to answer the other part ; and the answer goes to the whole bill, the answer being broader than the plea, overrules it. For the answer is to the part of the bill which it is the object of the plea not to answer. As this plea extends to the whole bill, it is essential to its validity, that such facts should be averred in it as shall make a complete defence. But it is not necessary in the plea to notice every allegation in the bill which does not involve the facts that constitute the bar. Where the plea does not cover the whole bill, as where it only sets upon a matter in bar to a part of the relief sought in the bill, the other part of the bill must be answered. In the case under *272] consideration, *the answer in support of the plea is not broader than the plea, and consequently does not overrule it.

I come now to examine the great question in the case ; and that is, whether the matter in bar, set out in the plea, constitutes a good defence to

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the bill. In entering upon this subject, it may not be improper to notice the hardship complained of by the plaintiff's counsel, in setting up the defence by a special plea. It is said, that the ground assumed is narrow and technical, and excludes the full merits of the controversy from being examined. That no opportunity is afforded the plaintiff to prove the mistake by the commissioners, in agreeing to Woodward and Saffrey's station as the place where the boundary line was to begin; and which is the main ground on which the bill prays for relief. It is true, a plea somewhat narrows the ground of controversy. Whilst it must contain all the facts material to a complete defence, it need not be extended to all the allegations of the bill. And the plaintiff may either take issue on the plea, or admit the truth of it, by setting it down for hearing; as has been done in this case. The office of a plea is to reduce the cause to a single point, and thus prevent the expense and trouble of an examination at large. But the matters stated in the bill, which are not denied by the plea, are admitted to be true. The case of the plaintiff, then, as now to be considered, is a full and as strong as it is presented in the bill, where not denied by the plea. The averments of the plea are admitted to be true; and the question is, whether those averments, counteracted by any allegations in the bill, not denied by the plea, constitute a bar to the right asserted by the plaintiff.

The plea states, that in the year 1642, Woodward and Saffrey erected a station or monument, at a point then taken and believed to be on the true and real boundary of Massachusetts, on the south. And that in 1710, this station was agreed to be the true boundary, and the place from which the line should be run, by Dudley and Jenckes, commissioners appointed by Massachusetts and Rhode Island; and who were authorized to settle and establish the line. And that afterwards, in the year 1718, other commissioners were appointed by Massachusetts and Rhode Island; to whom ample powers were given to compromise and settle for ever the boundary; and who established the same place of beginning. And that the report made to Rhode Island by its commissioners, setting forth the agreement, was accepted by its legislature, and duly recorded and ratified. And the plea avers, that the Massachusetts commissioners were guilty of no fraud or misrepresentation; and that both agreements were entered into with perfect fairness, and in good faith; and with full and equal knowledge by the parties. That the claims of the plaintiff, as set forth in the bill, were fully heard, discussed and settled. And that Massachusetts has retained possession and exercised *jurisdiction over the country north of the line thus established, until the present time. These are the facts, [*273 substantially, on which the defendant relies, as a bar to the plaintiff's bill.

The principal ground of relief alleged in the bill is, the mistake in fixing the place from which the line was to run, more than seven miles south of Charles river; whereas, by the charter of Massachusetts, it was to be but three miles south of that river. By the charter, the boundary was declared to be "three English miles south of any or every part of Charles river." Some doubt may arise from this phraseology, whether the three English miles are to be measured from the source of the southern branches of Charles river, or from the main channel of the river. And it would seem, from the establishment of the Woodward and Saffrey station, and other acts done in reference to this boundary, shortly after the date of the charter,

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and when its language was at least as well understood as at present, that the measurement was understood not to be required from the body of the river. At that early day, the country was a wilderness, and the land was of but little value; so that Massachusetts could have felt no very strong interest in establishing the line farther south than was authorized by the charter.

The bill alleges a mistake in this distance from the river, of the Woodward and Saffrey station, by the commissioners of Rhode Island, in both of the agreements respecting the boundary; and this mistake is not denied by the plea. But in the language of the plea, these agreements are now to be considered as having been fairly made, in good faith, without fraud or misrepresentation by the Massachusetts commissioners; and with an equal and full knowledge of the facts and circumstances of the case. And the inquiry is, whether a mistake committed under such circumstances affords a sufficient ground on which to set aside the agreements.

I will first consider the principles of this case, as they would apply to a controversy between individuals respecting a common boundary. The mistake of a fact, unless it operates as a surprise or fraud on the ignorant party, affords no ground for relief in chancery. 1 Story's Eq. 160; 2 Ball & Beat. 179, 180; 4 Bro. C. C. 158; 6 Ves. 24. The ground of relief in such cases is, not the mistake or ignorance of material facts alone, but the unconscientious advantage taken of the party by the concealment of them. For if the parties act fairly, and it is not a case where one is bound to communicate the facts to the other, upon the ground of confidence or otherwise, the court will not interfere. 1 Story's Eq. 160; 9 Ves. 275. It is essential, in order to set aside such a transaction, not only that an advantage should be taken, but it must arise from some obligation in the party to make the discovery; not an obligation in *point of morals only, but of legal duty. 2 Bro. *274] C. C. 240; 1 Harr. Eq. b. 1, ch. 3, p. 4, note n. Equity will not relieve, where the means of information are open to both parties; and where each is presumed to exercise his own judgment. 2 Wheat. 178, 195. Where an agreement for the composition of a cause is fairly made between parties, with their eyes open, and rightfully informed, a court of equity will not overhaul it; though there has been a great mistake in the exercise of judgment. 1 Ves. 408; 1 Story's Eq. 163. In like manner, where the fact is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a court of equity will not interpose. For in such cases, the equity is deemed equal between the parties; and when it is so, a court of equity will not interfere. 1 Pow. on Cont. 200; 1 Madd. Ch. 62-4; 1 Story's Eq. 163.

The principles recognised by these authorities apply, in all their force and conclusiveness, to the case under consideration. A greater number of authorities might be cited, but it cannot be necessary. The principles stated are founded on reason and the fitness of things; and they have been sanctioned by a uniform course of adjudication. If these rules are to be respected, and the mistake alleged in the bill had occurred under precisely the same circumstances between individuals, it would seem to be clear, that there would be no ground for relief.

A controversy exists between individuals, respecting a common boundary;

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one party claims that the line should begin at a certain point, and the other at a different one ; arbitrators are appointed, with full powers to settle and compromise the dispute, who establish the point as claimed by one of the parties. Some dissatisfaction is subsequently manifested by the unsuccessful party ; and seven years after the first reference, a second one is made to other persons, who are vested with ample powers to settle and compromise the controversy ; and they do settle it in exact conformity to the first award ; and this second award is reported to the principals, who sanction it. In addition to this, the line or place of beginning established by the arbitrators, is the place claimed by the successful party, as his line, more than seventy-five years before the second award ; and more than twenty years before the other party had any interest in the boundary. And the conduct of the arbitrators is free from any imputation of fraud or unfairness ; all having equal and full knowledge of the matter in dispute, which was fully and fairly discussed and understood, and finally determined. A case under these circumstances between individuals, to say nothing of the lapse of time and acquiescence, since the award, *would not seem to be very [275 strongly recommended to the equitable interposition of the court, on the ground that the arbitrators mistook a fact ; a mistake not induced by the opposite party, or by misrepresentation, but into which the arbitrators of the unsuccessful party had innocently fallen, having as full a knowledge of the whole merits of the case as the arbitrators chosen by the other party. Relief, which should set aside the award, and open up the controversy, under such circumstances, would create a new head of equity.

The mistake is admitted, because it is not denied by the plea ; and this may be said to be a technical advantage of the plaintiff. For if the fact of mistake were to be tested by the circumstances of the case, it would be difficult to come to the conclusion that a mistake had really occurred. If it were admitted to have taken place in the first award, it would require no small degree of credulity, to believe, that it again occurred in the second award, made seven years after the first one ; and after much dissatisfaction had been manifested against the first award. This dissatisfaction could only have arisen, from the supposed fact that the boundary had been established too far south. But as the case is now considered, the mistake alleged is admitted ; but admitted under all the averments of the plea.

If the Woodward and Saffrey station be as many miles south of Charles river, as alleged in the bill ; it would seem to be a more reasonable supposition, that it was agreed to, under a construction of the charter, or on the principles of compromise, than through mistake. But the mistake being admitted, still, as between individuals, there would be no sufficient ground for the interposition of a court of equity. And if relief could not be given between individuals, can it be decreed, under the same circumstances, as between sovereign states. There are equitable considerations, which would seem to apply with greater force to controversies between individuals, than to those which arise between states. Among states, there is a higher agency, greater deliberation, and a more imposing form of procedure, in the adjustment of differences, than takes place between private individuals. Between the former, from the nature of the proceeding, mistakes of fact seldom occur ; and when they do happen, it is rather a question of policy than of right, whether they shall be corrected.

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I am inclined to think, with the counsel on both sides, that the great question in this case should not be decided by the rules for the settlement of private rights. The high litigant parties, and the nature of the controversy, give an elevation and dignity to the cause which can never belong to differences between individuals. It may be a simple matter to determine where a line shall be run ; but when such determination may draw after it a change of sovereign power over a district of *country, and many *276] thousand citizens, the principles involved must be considered as of the highest magnitude. The question is national in its character ; and it is fit and proper that it should be decided by those broad and liberal principles which constitute the code of national law.

Vattel, in his treatise, p. 277, says, "When sovereigns cannot agree about their pretensions, and are nevertheless desirous of preserving or restoring peace, they sometimes submit the decision of their disputes to arbitrators, chosen by common agreement. When once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators : they have engaged to do this ; and the faith of treaties should be religiously observed." And again, "In order to obviate all difficulty, and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrators ; and it is upon these points alone, that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They cannot say, that it is manifestly unjust ; since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred, as such, to the decision of the arbitrators. Before they can pretend to evade such a sentence, they should prove, by incontestable facts, that it was the offspring of corruption or flagrant partiality." And again, in page 178, he says, "Arbitration is a very reasonable mode, and one that is perfectly conformable to the law of nations, for the decision of every dispute which does not directly interest the safety of the nation. Though the claim of justice may be mistaken by the arbitrators, it is still more to be feared that it will be overpowered in an appeal to the sword." The author well observes, that the Helvetic republic, by a wise adherence to this mode of adjusting controversies among themselves, and with foreign countries, has secured its liberty, and made itself respectable throughout Europe.

These principles have been established by the common consent of the civilized world. And where they are invoked in the settlement of disputes between states, and the proceeding is characterized by fairness and good faith, it ought not to be set aside, and indeed cannot be ; without, in the language of Vattel, proving by the clearest evidence, that the award was the offspring of corruption or flagrant partiality. And if the determination of the arbitrators has the sanction of time as well as of principle, it is believed, that history affords no instance where it has not been considered as absolutely binding on the parties. The peace of nations, and the prosperity of mankind, require that compacts thus formed should be held sacred.

*277] *The pretensions of Massachusetts in favor of the line as estab-

lished by both arbitrations, commenced in 1642; and no other jurisdiction had been, at any time, exercised over the country north of this line. It was claimed before Rhode Island had a political existence. The elements of which it was afterwards composed, were, at the time this right was first asserted, mingled with the parent colony of Massachusetts; and with other communities and nations. And after they became embodied and organized under the charter of 1663, it was nearly half a century before there seems to have been any dispute respecting this boundary. Nearly two centuries have elapsed since the claim of Massachusetts to this line was set up, and more than a hundred and twenty years since the controversy was settled by the commissioners or arbitrators chosen by the parties; and, as averred in the plea, specially sanctioned and confirmed by Rhode Island. Is time to have no influence in this case, on the agreements of the parties? It covers with its peaceful mantle stale disputes between individuals; and so strong is its influence, that fraud, which vitiates all human transactions, cannot be reached when covered by great lapse of time. Has a treaty ever been set aside on the ground of mistake? Has it ever been contended, that after its ratification by the high contracting parties, either could look behind the treaty and object to it, because the negotiators had mistaken a fact? It is believed, that such a pretension would be new in the history of diplomacy. The treaty must speak for itself; and under its provisions must the rights of the parties be ascertained.

In the first treaty of limits between this country and Great Britain, it is a fact, not now questioned, that a mistake of many miles was made in establishing our northern boundary. But this has afforded to Great Britain no occasion of remonstrance or complaint. Our own government, on a recent occasion, declined an acquiescence in the decision of the king of the Netherlands, in relation to this same boundary. But in his letter of July 21st, 1832, to the representative of Great Britain in this country, the secretary of state says, in relation to the resolution of the senate against the decision; that it was adopted under the conviction that the arbiter had not decided the question submitted to him, or had decided it in a manner not authorized by the submission." "It is not," he adds, "the intention of the undersigned, to enter into an investigation of the argument which has led to this conclusion. The decision of the senate precludes it, and the object of this communication renders it unnecessary; but it may be proper to add, that no question could have arisen as to the validity of the decision, had the sovereign arbiter determined on and designated any boundary as that which was intended by the treaty of 1783." This view, by the secretary, of the binding effect of the decision, if it had been made on the point submitted to the arbiter, is in accordance *with the principles of national law, [278 and has a direct and most forcible application to the case under consideration.

No objection is made by Rhode Island that the arbitrators exceeded their powers. No such objection can be made. Their powers were ample; and their proceedings, both in 1710, and in 1718, seem to have been characterized by great dignity and deliberation. The complainant, it is true, was dissatisfied with the first decision, establishing Woodward and Saffrey's station; and by remonstrances induced the appointment of the second commission in 1717, which, in the following year, confirmed, in all respects, the

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first decision. Notwithstanding these remonstrances against the first decision, it would seem from the bill, that untill 1749, the complainant believed that Woodward and Saffrey's station was only three English miles south of Charles river; and was, consequently, the true point from which the line should be run. This being the case, as the bill does not state the precise ground of dissatisfaction at the first report, it cannot well be imagined. Rhode Island, it seems, from time to time, by remonstrances, in the form of resolutions and otherwise, and by the appointment of commissioners, signified its dissatisfaction at the boundary, as established in 1710 and 1718. Massachusetts, as it was bound in comity to do, listened to these expressions by Rhode Island; and more than once appointed commissioners on the subject. But whether we look to the averments in the plea, or to the statements in the bill, the defendant never seems to have done anything which could impair the force of the agreements.

The bill states various facts, such as the little value of the land bounding on the disputed line for many years, the sparseness of the population, the want of means, and the intervention of war, as reasons why Rhode Island did not bring this controversy before the king in council, under the colonial government. It appears from the exhibits accompanying the bill, that, in 1740, there being a dispute between Massachusetts and Rhode Island, whether the former could exercise its jurisdiction to the shores of the Narraganset bay, the king of Great Britain appointed commissioners to settle the controversy, who decided against Massachusetts. This decision was confirmed, on an appeal from the commissioners, by the king and council. So long as the colonial government continued, this mode of redress, so successfully invoked by the complainant in the above instance, remained open. The articles of confederation, formed by the new government, made special provision for the settlement of disputed boundaries between states. And when these were revoked by the adoption of the constitution, the tribunal at last appealed to was open; and has ever remained ready to hear and decide the controversy. Giving full weight to all the allegations in the bill, which go to *excuse the delays of Rhode Island in asserting its

*279] claim, it is still difficult to say, that the claim remains unaffected by the unmolested possession of Massachusetts, according to the agreements. Rhode Island, it is true, is small in territory, and weak in numerical force, but it has always stood high in moral power, and intellectual endowment; and the tribunals which, since the commencement of the controversy, have been open to hear its complaint, have been tribunals of reason, of justice and of established law.

The arguments of the counsel for the complainant, zealous and able as they were, rested mainly on the hardship and injustice of deciding this controversy on the pleadings as they now stand. The mistake is admitted; and what is there else in the bill, taken in connection with all the facts and circumstances, which can give the case of the complainant a more imposing form. No fraud is imputed; the sealed agreements, now and ever, must speak in the same language; the effect of time will remain; and the excuses alleged in the bill for delay, can scarcely have, under any form of pleading, greater effect than may be given to them as the case now stands. I speak not of the volume of evidence which may be thrown into the case by a change of the pleadings; but of the leading and indisputable facts which

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must, under any form of procedure, have a controlling influence in the decision. Believing, as I do, that in admitting the truth of the plea, Rhode Island has done nothing prejudicial to her interests ; and that in the present attitude of the case, its substantial merits are before us, I feel bound to pronounce a different opinion from that which has been given by a majority of my brother judges. Taking the facts of the plea, and giving due weight to all the allegations of the bill, not denied by the plea, I am led to the conclusion that the bar is complete. In coming to this conclusion, I feel no want of respect for the state of Rhode Island, which has become so illustrious in our history, by its enterprise, its intelligence and its patriotism.

CATRON, Justice.—The facts and pleadings have been so fully stated by my brethren, as to require from me only a brief notice of the conclusions my mind has come to on the points in controversy. The defence, in the form of an incongruous plea, must set up matter in bar, which, if true, renders immaterial every other fact alleged in the bill ; be these as they may, the defence must be conclusive of the controversy ; and every necessary averment to sustain the matter pleaded in bar, must also be made in an answer covering the plea, which cannot be permitted to stand unsupported by an answer. This is the familiar and settled practice of the high court of chancery in England ; and adopted by rule in the courts of the United States.

In form, it is believed, the plea and answer in this cause are accurate in a high degree, in regard to the matter pleaded, and the *averments necessary to give it effect, in the sense it is relied on as a bar ; unless [*280 the defence set up be double.

It is insisted, the plea is multifarious, because it relies on two defences : first, the compacts ; and second, the possession and occupation of the territory claimed by the plaintiff, for more than a century. The facts pleaded must be conducive to a single point of defence ; and the question is, are the compacts, the marking of the line in part execution of them, and the taking and holding possession in other part, and complete execution of them, combined facts and circumstances, conducing to establish the single point relied on in defence ? That is, that the line run from Woodward and Saffrey's station was the true boundary, established by, and marked in execution of, the compacts ; and that by the compacts Rhode Island is estopped to deny its validity. And I think the circumstances pleaded are so connected as not to vitiate the plea. If it is bad, it must, therefore, be so on its merits, involving the obligatory force of the compacts. That they are *prima facie* conclusive of the boundary, is admitted ; but the bill alleges they were made in mistake, and the line run and marked, and possession surrendered to Massachusetts, in mistake of a prominent fact ; that Rhode Island then believed the station, and the line run from it, three miles south of Charles river ; whereas, subsequent observation and examination had ascertained it to be much further south, that is, about seven miles. The Massachusetts charter calls for a line to be drawn east and west, "three miles south of the waters of said Charles river, or of any, or every part thereof ;" and the plea, in substance, avers, the charter was construed, and the line settled by the compacts, without misrepresentation on the part of Massachusetts, and with full and equal knowledge of all circumstances by both parties.

The plea having been set down for argument, without an issue, must for the present be taken as true ; and the averments taken as admitted, that the parties entered into the compacts, and established the boundary, with full and equal knowledge of all the circumstances of law and fact involved in the controversy, as it then existed, and now exists. And in the face of the compacts thus made, can Rhode Island be heard to allege the existence of a mistake in the boundary established by them ; and marked by the mutual commissioners, and as the joint act of both parties ? Under the circumstances, to open the controversy, and let in proof of a mistake, at this day, to overthrow a solemn treaty made between two independent governments, is deemed by me, inadmissible, not to say dangerous. And I think the matters pleaded (if true) a good defence. If this compromise and solemn establishment of a boundary, made a century ago, can be impeached on the ground of a mistake, so palpable and easy of detection ; cannot every other made by the states be brought before this court, on a similar assumption, usually much better founded ; especially, where degrees of latitude *281] *are called for as boundaries ? If the parties, " with full and equal knowledge of all circumstances," compromised and settled a doubtful construction of the Massachusetts charter, and in which they were engaged nearly ten years ; why should this court go further into the matter, at the hazard of encouraging litigation in so many other quarters ?

I will, for the present, refrain from entering into the inquiry, how far such a mistake of law, in construing a private instrument, could be inquired into by a court of chancery, in a suit between man and man ; nor what help the mistake of law (if any exists) could derive from the facts apparent by the bill, unless the statement of the proposition should suggest the answer. Nor will I attempt to draw the marked line of distinction between such private agreement, and a public treaty, by state with state ; in regard to the difficulty of going into matters of mistake, usually not predicable of a treaty.

ON consideration of the plea filed in this case by the defendant, and of the arguments of counsel thereupon had, as well in support of as against the said plea, it is now here ordered by this court, that the said plea be and the same is hereby overruled ; and it is further now here ordered by this court, that the defendant answer the bill of complaint, as amended, on or before the first day of the next term.

*ALBERT P. DE VALENGIN'S Administrators, Plaintiffs in error, v.
JOHN H. DUFFY, Defendant in error.

Legality of contract.—Covering belligerent property.—Responsibilities of executors.—Assets.

It has been frequently held, that the device of covering property as neutral, when in truth it was belligerent, is not contrary to the laws of war or of nations; contracts made with underwriters in relation to property thus covered, have always been enforced in the courts of a neutral country, where the true character of the property, and the means taken to protect it from capture, have been fairly represented to the insurers; the same doctrine has always been held, where false papers have been used to cover the property, provided the underwriter knew, or was bound to know, that such stratagems were always resorted to, by the persons engaged in that trade. If such means may be used to prevent capture, there can be no good reason for condemning with more severity, the continuation of the same disguise, after capture, in order to prevent the condemnation of the property, or to procure compensation for it, when it has been lost by reason of the capture. Courts of the capturing nation would never enforce contracts of that description; but they have always been regarded as lawful in the courts of a neutral country.

Whatever property or money is lawfully recovered by an executor or administrator, after the death of his testator or intestate, in virtue of his representative character, he holds as assets of the estate; and he is liable therefor, in such representative character, to the party who has a good title thereto. The want of knowledge, or the possession of knowledge, on the part of the administrator, as to the rights and claims of other persons, upon the money thus received, cannot alter the rights of the party to whom it ultimately belongs.

The owner of property or of money received by an administrator, may resort to the administrator in his personal character, and charge him, *de bonis propriis*, with the amount thus received; he may do this, or proceed against him as executor or administrator, at his election. But whenever an executor or administrator, in his representative character, lawfully receives money or property, he may be compelled to respond to the party entitled, in that character; and will not be permitted to throw it off, after he has received the money, in order to defeat the plaintiff's action.¹

In the case of a factor who sells the goods of his principal in his own name, upon a credit, and dies before the money is received, if it is afterwards paid to the administrator, in his representative character, the creditor would be entitled to consider it as assets in his hands; and to charge him in the same character in which he received it. The debtor, that is to say, the party who purchased from the factor, without any knowledge of the true owner, and who paid the money to the administrator, under the belief that the goods belonged to the factor, is unquestionably discharged by this payment; yet he cannot be discharged, unless he pays it to one lawfully authorized to receive it, except only in his representative character.

ERROR to the Circuit Court of Maryland. In the circuit court of Maryland, John H. Duffy, the defendant in error, instituted a suit against the administrators of Albert P. De Valengin, for the recovery of a sum of money which he claimed to belong to him, being a portion of thie indemnity paid by the government of Brazil, for the capture and loss of the brig President Adams, by a Brazilian cruiser, in 1828.

John H. Duffy, a citizen of the United States, domiciled at Buenos Ayres, in 1828, shipped a quantity of hides, and other articles of merchandise, in 1828, on board the brig President Adams, commanded and part owned by Albert P. De Valengin, a citizen of Baltimore, *for Gibraltar. The government of Brazil and that of Buenos Ayres were then at war [*283 For the better security of the property from Brazilian capture, the property was shipped in the name of De Valengin, and soon after she sailed, she was

¹ And see Taylor v. Benham, 5 How. 233.

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captured by an armed vessel of Brazil, and carried into Monte Video. There, both vessel and cargo were totally lost. Under an agreement between John H. Duffy and Captain De Valengin, a claim for the cargo as well as the vessel was made by him, on the government of Brazil, for indemnity. The ownership of John H. Duffy was concealed in this application, as his property was liable to capture by the cruisers of Brazil; he being domiciled at Buenos Ayres. Captain De Valengin died before anything was recovered from the government of Brazil for the President Adams and cargo; and a certain James Neale, who had become his administrator, under letters of administration granted in Maryland, prosecuted the claim as the representative of De Valengin; and was, at length, paid the indemnity in Baltimore, by the aid of Mr. James Birkhead, of Rio de Janeiro; who remitted it to him from that place. The proceeds of the property remitted by Mr. Birkhead, were returned in an inventory filed by Mr. Neale, as administrator, in the orphans' court, at Baltimore, as the estate of De Valengin.

A suit for the recovery of the amount claimed by John H. Duffy, was instituted in the circuit court of the United States against James Neale, as the administrator of De Valengin; and he having died before the trial of the cause, and the plaintiffs in error having taken out letters of administration, *de bonis non*, to the estate of De Valengin, they were summoned, and appeared and took defence in the action. In the declaration, the only count applicable to the controversy between the parties to the suit, was that for money had and received by James Neale, the administrator of De Valengin, for the use of the plaintiff. On the issues of *non assumpsit* and *plene administravit*, the jury found for the plaintiff on the first, and for the defendants on the second count. The circuit court entered a judgment on the first plea for the amount found by the jury, \$14,013.67; the judgment to bind assets. From this judgment, the defendants prosecuted their writ of error.

On the trial of the cause in the circuit court, the defendants took a bill of exceptions to the decisions of the court, on six different propositions or prayers, submitted by their counsel for the opinion of the court. The bill of exceptions contained the whole evidence in the cause. All the prayers of the counsel for the defendants were refused by the court. The opinion of the supreme court on the matters presented under the writ of error, was given on two propositions; into which all those submitted in the circuit court were considered to be resolved.

1. That the agreement between Captain De Valengin and John *H. Duffy, under which De Valengin was to claim remuneration from the Brazilian government, for the loss of the brig President Adams and her cargo, on the ground of its being neutral property; when, in truth, the cargo was the property of John H. Duffy, and therefore, belligerent, and liable to capture by the laws of nations, was fraudulent and immoral; and that the courts of justice of the United States would not assist a party to recover money due on such agreement.

2. That if the money belonged to John H. Duffy, the action would not lie against Neale, as administrator, nor the money be assets in his hands of De Valengin's estate; that his return to the orphans' court could not alter the character of the transaction; and this suit ought to have been continued against Neale's administrator, and not against the representatives of De Valengin.

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The case was submitted to the court, on printed arguments, by *McMahon* and *Johnson*, for the plaintiffs in error; and by *Williams*, for the defendant in error.

On the first proposition, as stated by the circuit court in its opinion: the counsel for the *plaintiffs* in error contended, that the alleged agreement between John H. Duffy, the defendant in error, and Captain De Valengin, by which the latter was to prosecute the claim on the Brazilian government, for indemnity for the loss of the brig *President Adams* and her cargo, representing the whole property to belong to him, and, as such, not liable to capture; proposes nothing more or less than the case of two persons conspiring to cheat a third party out of his property. The object of the agreement was merely to extract money from the third party; and this was to be accomplished by conspiring to make a false and fraudulent representation of an injury done to one of them, who, in fact, had sustained no injury; and this falsely alleged injury is made the sole basis of the payment by the third party. The verdict of the jury admits that the payment was made only in consequence of the false and concerted misrepresentations; and would not have been made, if the truth had not been suppressed by the conspiracy. It is contended, that such an agreement will be held fraudulent everywhere; and that, in such a case, the fraud has no locality.

If two individuals were to conspire, in a foreign country, to obtain money from a third party, either by highway robbery or theft, or by cheating of any description; and under the conspiracy, one of them were to obtain the money of the third party; it would scarcely be contended, that under such an agreement, the other could claim from his associate in the conspiracy, a share of the plunder, through the instrumentality of a court of justice. It is contended, that there is no difference between such a case, and a conspiracy to cheat a government; and that such a conspiracy is essentially different, as it regards its validity in our courts, from contracts made for the purpose of evading the revenue laws, or the mere commercial regulations *of a foreign country; when to invalidate such a con- [285
tract would be substantially to enforce such laws and regulations.

It is contended also, that not only was such an agreement void; and that thereby the principal fact on which the court instructed the jury in favor of the plaintiff in the circuit court was removed from the case; but that the existence of such an agreement necessarily prevented a recovery from the plaintiffs in error; as it would have precluded a recovery against De Valengin, if he had obtained the money from the Brazilian government. The case put, on the whole of the proof of the defendant in error, established this fraudulent agreement, and showed that the money had been obtained by false documents, furnished by John H. Duffy, or obtained by his aid and with his privity.

The property thus coming into the possession of the administrator, the effect of this action was and is, to repudiate the plaintiff's own fraudulent documents, evidencing title in De Valengin; and to reclaim the property, by force of the agreement to pay over the money to him, when recovered. The action could only be maintained upon the agreement to pay over the money, when received—he having parted with the title, for the fraudulent purpose; this agreement to pay over was a part and parcel of the corrupt

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and fraudulent agreement, which could not be severed from the latter, nor established without proof of it. The case, therefore, fell within the scope of the well-established principle, "that when recovery cannot be had, except by proof of the illegal or corrupt agreement, or through the medium of it, it cannot be had at all."

The counsel for the plaintiffs in error also contended, that the proof of the fraudulent agreement showed conclusively that the defendant in error had no title to the money sought to be recovered; that by his own showing, the title to it was in the Brazilian government; that the money sought to be recovered was not, and never had been, his property, or the proceeds of his property; but was, on the contrary, a sum of money originally belonging to the Brazilian government, and obtained by fraud from it; and the proof of the fraud furnished by himself, and shown in the agreement supposed by the prayer, established that the title was still in the said government, and not in the defendant in error.

Upon the second proposition, as stated in the opinion of the court, that the action would not lie against Neale, as administrator, nor the money be assets in his hands, of the estate of De Valengin; that the return of Neale to the orphans' court cannot change the character of the transaction; and that the action should have been continued against Neale's administrator, and not against the plaintiffs in error—the counsel for the plaintiffs in error contended:

The only pretence of claim against the estate of De Valengin and the plaintiffs in error, as administrators *de bonis non* of his estate, is founded on the allegation, that Neale, in his lifetime, received the proceeds of property which did not belong to De Valengin, but in fact belonged to the defendant *286] in error, John H. Duffy; and had *wrongfully carried it into the estate of which he was administrator. The administrator could not, by a wrongful receipt or conversion of property which did not belong to the intestate, create a debt against the intestate, or charge against the estate of the intestate, which enables the owner of the property to come in as a general creditor against the estate. The administrator alone is personally liable for such wrongful receipt or conversion; even where the property has gone to the benefit of the estate. This is established by numerous and uncontradicted decisions, which settle it beyond controversy, that upon a count for money had and received by an administrator, no other judgment can be rendered than the judgment *de bonis propriis*; and that such a count cannot be joined with any counts on an indebtedness of the intestate, or with any indebtedness of the administrator as such; such as money paid for the use of the estate, &c., which does create a debt against the estate. Cited, *Jennings v. Newman*, 4 T. R. 348; *Brigden v. Parkes*, 2 Bos. & Pul. 424; *Powell v. Graham*, 7 Taunt. 580; *Ashby v. Ashby*, 7 Barn. & Cres. 444; 1 Chit. Prec. 46, note; *Reynolds v. Reynolds*, 3 Wend. 240; *Sumner v. Williams*, 8 Mass. 198.

Even if there was any remedy against the estate, in such a case, it would be found only in the right to follow and reclaim the specific property so wrongfully carried into the estate, by a proceeding for the specific recovery of it, or by a special claim against the estate, founded on the allegation that the property had been carried into the estate and appropriated to its uses: and this, even if the recovery could not be had against the estate,

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through the medium of the mere common count for money had and received by the administrator.

There was no foundation for any such claim against the estate, as it was conceded, that Neale died after having sold the property and received the proceeds, and that no part of the said proceeds had ever been paid over to the plaintiffs in error, or accounted for to them, either by Neale in his lifetime, or by his administrators since his death; and the plaintiff had, therefore, an ample remedy against Neale's administrators for the recovery of the money. It was insisted, that the mere return of it, in an inventory, by Neale, could not vary the question; not only because he could not, by his mere act of charging himself with it to the estate, make the estate a debtor therefor to the owners; but also because the recovery by title paramount, in an action by Duffy against Neale, or his administrators, would have been a full protection against any claim founded on the mere return in the inventory. There is nothing in the Maryland act of 1820, ch. 174, to change the common-law rules on this subject (as was supposed in the court below), or even to bring it within the operation of that act as expounded by the courts of Maryland, in *Sibley v. Williams*, 3 Gill & Johns. 63-4; and that there was no evidence in the cause, to show that the money received by Neale on the sales, was in such a predicament, that the plaintiffs in error or administrators *de bonis non* could have pursued and recovered [*287 the money, according to the construction of that act in the case just referred to; and that the plaintiff's remedy as to assets, in such a predicament, was against Neale's estate, or on his bond.

Williams, for the defendant in error.—By the laws of Maryland, administrators *de bonis non* are entitled, and their duty requires them, to demand from the legal representatives of the former administrator, the delivery over to them of all bonds, notes, accounts and evidences of debt, and to require the payment over of all money, belonging to the original estate. And such bonds, &c., and money, are assets in the hands of the administrators *de bonis non*. Laws of Maryland, 1798, ch. 101, sub-ch. 14, § 2; 1820 ch. 174, § 3-5. It is, accordingly, not only the right, but the duty, of the plaintiffs in error, to demand from Neale's representatives the money and property, admitted by him, in his lifetime, to be in his hands, as the estate of De Valengin. The representatives of Neale cannot claim this property as a part of his estate. Nor can the new administrators of De Valengin reject it, as forming no part of De Valengin's estate. If the administrators *de bonis non* have neglected, and are neglecting, to perform their duty, in not calling on Neale's representatives for a delivery over of the property of their intestate; they can be compelled, by application to the proper tribunal, to discharge their duty in this particular. In the meantime, it cannot be an objection, to be urged by the delinquent parties themselves, that they have failed in their duty. Nor, surely, ought it to work a loss or an injury to Duffy, that he has presumed they have fulfilled, or will fulfil, the obligations prescribed by law in this respect.

And, further, if Duffy had the alternative, as he doubtless had, under the circumstances of this case, to treat Neale in his individual character as his debtor; he most clearly had a right to embrace the more disadvantageous alternative of regarding De Valengin's estate as his debtor. In adopt-

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ing the latter alternative, as has been before remarked, it cannot belong to the plaintiffs in error to falsify Neale's admission; and deny that to be their intestate estate, which the first administrator declares on oath to be such. There is as little grace, as there is law, in placing themselves in such attitude. 2 Wms. Ex. 1086; 1 Taunt. 322.

As to the assumption of the counsel for the plaintiffs in error, that the contract between De Valengin and the defendant was fraudulent and immoral, under which the indemnity for the cargo of the President Adams was claimed from the Brazilian government, and therefore, cannot be made the subject of a suit in a court of the United States; the counsel for the defendant in error said, that it assumes that in a court of the United States, *288] between citizens of the United States, an agreement cannot be enforced, which seeks to guard *bond fide* American property from seizure by one belligerent power that is at war with another; both of them being at peace with the United States. The device practised in this case, by placing the property in the name of the master, is not forbidden either by the laws of nations, the laws of war, or the laws of morality.

The residence of Duffy in Buenos Ayres, which imposes upon him a temporary allegiance to one of the belligerent parties, may subject his property, if captured, to condemnation in the courts of the other. But if the property is restored or indemnified for, either because the capturing power chooses to waive its right to condemn, or because the residence of its true owner is unknown, it ought clearly to inure to the benefit of the true owner against all the rest of the world. It would be monstrous, and against all law and justice, to allow the other contracting party, who has participated in the seizure, to claim that as his own, which he admits to be another's; and which he has promised to account for, when received. 1 Bos. & Pul. 3; 7 Wheat. 283; 8 Ibid. 294. The cases relied on by the defendants below, are irrelevant to the points in issue. They chiefly relate to controversies between a neutral and a belligerent, as 2 Dall. 34; 1 Kent's Com. 143; 7 Wheat. app'x, 27; Story's Conf. L. 214, or to cases of insurance, where there was a concealment of material facts, as 3 W. C. C. 391; 2 Phil. Ins. 130.

TANEY, Ch. J., delivered the opinion of the court.—This case comes here, upon a writ of error to the circuit court for the district of Maryland. It appears from the record, that John H. Duffy, an American citizen, being engaged in commerce, and domiciled at Buenos Ayres, shipped a cargo of hides and lard to Gibraltar, on board the brig President Adams, in 1828. Buenos Ayres was then at war with Brazil. The President Adams was an American vessel; and De Valengin, her master, was a citizen of the United States; he was also part-owner of the vessel. In order to protect the cargo from capture by the Brazilians, it was shipped as the property of De Valengin; and the bill of lading, and other papers in relation to it, were made out in his name. The brig was, however, captured on her voyage by a Brazilian cruiser, and was wrecked; and the vessel and cargo totally lost, near Monte Video, while in possession of the captors; who were endeavoring to carry her into port. De Valengin being the ostensible owner of the cargo, he, with the consent of Duffy, prosecuted a claim for remuneration from the Brazilian government; insisting that the property

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belonged to him ; that it was neutral property, and therefore, unlawfully captured. De Valengin died, before he recovered anything ; and after his death, James Neale took out letters of administration on his estate, [*289 in the city of Baltimore, and continued to prosecute the claim, upon the ground that the property was De Valengin's ; and at length succeeded in obtaining compensation for it from the Brazilian government. The money was paid to Neale's agent, at Rio de Janeiro, and invested in coffee, and shipped to him to Baltimore ; where he received and took possession of it, as property belonging to De Valengin's estate, and as his administrator. It was duly appraised as the property of De Valengin, and returned as such by Neale, to the orphans' court, in January 1834 ; and afterwards was sold to him, and the money received. It does not appear from the evidence, whether Neale had or had not any knowledge of the interest of Duffy in the cargo, while he was prosecuting the claim against the Brazilian government ; or when he received the compensation for it.

In March 1834, Duffy brought suit against Neale for the money he had thus received. The suit was against Neale, as administrator of De Valengin. In 1836, Neale died, the suit being still pending ; and after his death, process was issued against the present plaintiffs in error, who are the administrators *de bonis non* of De Valengin, in order to make them defendants to the suit which he had instituted against Neale, in his lifetime, as administrator as aforesaid. The declaration was amended by the plaintiff, after the appearance of the administrators *de bonis non* ; and the only count applicable to the case, as it appears in the testimony, was that for money had and received by Neale, as administrator of De Valengin, to and for the use of the plaintiff. The defendants pleaded *non assumpsit* and *plene administravit*, upon which issues were joined ; and the jury found for the plaintiff on the first issue, and for the defendants on the second ; and the judgment was entered for the amount found due by the jury, in the usual form, to bind assets when they shall arise.

At the trial, several instructions were asked for by the defendants, which were refused by the court. They may all, however, be resolved into two. 1. That the agreement between De Valengin and Duffy, to claim remuneration from the Brazilian government, upon the ground, that it was neutral property, when in truth it was Duffy's, and therefore, belligerent, and liable to capture by the laws of nations, was fraudulent and immoral ; and that the courts of justice of this country will not assist a party to recover money due on such an agreement. 2. That if the money belonged to Duffy, the action would not lie against Neale, as administrator, nor the money be assets in his hands, of De Valengin's estate ; that his return to the orphans' court cannot alter the character of the transaction ; and that the suit ought to have been continued against Neale's administrator, and not against the representatives of De Valengin.

The first question may be disposed of in a few words. It has been frequently held, that the device practised in this case, of covering the property as neutral, when in truth it was belligerent, *is not contrary to the [*290 laws of war, or the laws of nations. And contracts made with underwriters in relation to property thus covered, have always been enforced in the courts of a neutral country, when the true character of the property and the means taken to protect it from capture, have been fairly represented to

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the insurer. The same doctrine has always been held, where false papers were used to cover the property ; provided, the underwriter knew, or was bound to know, that such stratagems were always resorted to by persons engaged in that trade. And if such means may be used to prevent a capture, there can be no good reason for condemning, with more severity, the continuation of the same disguise, after capture, in order to prevent the condemnation of the property, or to procure compensation for it, when it has been lost by reason of the capture. It is true, the courts of the capturing nation would never enforce contracts of that description ; but they have always been regarded as lawful in the courts of a neutral country.

The second question is one of more nicety, and the cases are not entirely reconcilable to each other. There are, doubtless, decisions which countenance the doctrine, that no action will lie against an executor or administrator, in his representative character, except upon some claim or demand which existed against the testator or intestate in his lifetime ; and that if the claim or demand wholly accrued in the time of the executor or administrator, he is liable therefor only in his personal character. But upon a full consideration of the nature, and of the various decisions on the subject, we are of opinion, that whatever property or money is lawfully recovered or received by the executor or administrator, after the death of his testator or intestate, in virtue of his representative character, he holds as assets of the estate and he is liable therefor, in such representative character, to the party who has a good title thereto. In our judgment, this, upon principle, must be the true doctrine.

In the case of a factor, who sells the goods of his principal, in his own name, upon a credit, and dies before the money is received, if it is afterwards paid to the administrator, in his representative character ; would not the creditor be entitled to consider it as assets in his hands, and to charge him in the same character in which he received it ? The want of knowledge, or the possession of knowledge, on the part of the administrator, as to the rights or claims of other persons upon the money thus received, cannot alter the rights of the party to whom it is ultimately due. The debtor, that is to say, the party who purchased from the factor, without any knowledge of the true owner, and who pays the money to the administrator, under the belief that the goods belonged to the factor himself, is unquestionably discharged by this payment. Yet he cannot be discharged, unless he pays it to one lawfully authorized to receive it ; and the party to whom he pays cannot be lawfully authorized to receive, except only in his representative
*291] character. If he is *authorized to receive in that character, why should he not be liable in that character ? Again, if a note had been taken by the factor, payable to himself, and after his death, his administrator sued upon it in his representative capacity, and recovered the money ; would he not be liable to the principal, in the same character in which he had, by the judgment of a court, recovered the money ? It would be difficult to reconcile the contrary doctrine to any sound principles of reason, or to find any countenance for it in analogous cases. We do not mean to say, that the principal may not, in such cases, resort to the administrator, in his personal character, and charge him, *de bonis propriis*, with the amount thus received. We think he may take either course, at his election ; but that whenever an executor or administrator, in his representative character, law-

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fully received money or property, he may be compelled to respond to the party entitled, in that character ; and shall not be permitted to throw it off, after he has received the money, in order to defeat the plaintiff's action.

In this case, De Valengin was the bailee of the goods shipped by Duffy, and had a special property in them ; and it was his duty to take all proper measures for their safety and preservation. He had a right to sell and transfer the goods, in his own name, and as his own property. The Brazilian government, by agreeing to pay the money, admitted that the debt was justly due to him, on account of the destruction of this cargo. Whether that government was deceived or not, is another question ; and does not affect the point now to be decided. The admission of the debt as due to De Valengin, places this case upon the same principles with that of a factor before mentioned, who had sold the property of his principal, in his own name, and died before the receipt of the money. If the administrator is lawfully entitled to receive it, in his representative character, and does so receive it, he is liable, in the same character, to the party entitled. Neale prosecuted the claim, and received the money, as the administrator of De Valengin ; he must account for it in the same character.

If this transaction had taken place before the act of assembly of Maryland, of 1820, ch. 174, the suit must, unquestionably, have been continued against Neale's representatives, and could not have been sustained against the administrators *de bonis non* of De Valengin ; because the property which Neale had received as administrator was converted into money in his lifetime, and must, therefore, have been accounted for by his administrator, and would not have passed to the administrator *de bonis non* of the former intestate. But by the third section of the act of 1820, ch. 174, the administrator *de bonis non* is entitled to the bonds, notes, accounts and evidences of debt, which the deceased executor or administrator may have taken, and to the money in his hands in his representative character ; and he is authorized to recover them in the manner there pointed out. And the money now in controversy being, as we have already said, *lawfully in the hands of Neale, in his representative character, the administrators *de bonis non* are entitled to it ; and as they are author- [*292 ized to recover the fund out of which the money due to Duffy is to be paid, he had a right to make them parties to the suit which he had instituted against the first administrator, and to continue it against them. They are not injured, nor in any manner placed in danger, by this proceeding. For they are not liable, unless the money is recovered from Neale's representatives or sureties ; provided there is no negligence or breach of duty on their part.

The motion in arrest of judgment offered in the circuit court, if it had been objectionable upon other grounds, was evidently too late, by the rules of the court ; and, on that account, properly overruled. The judgment of the circuit court is, therefore, affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

*GUY C. IRVINE, for the use of The LUMBERMAN'S BANK AT WARREN,
v. NATHANIEL A. LOWRY.

Jurisdiction.—Citizenship of stockholders.—Negotiable paper.

An action was brought by foreign attachment, in the court of common pleas of Warren county, Pennsylvania, in the name of a citizen of Pennsylvania, for the use of The Lumberman's Bank, at Warren, Pennsylvania, against a citizen of New York; the suit was on a note given by the defendant to the plaintiff, to be paid "in the office-notes of the Lumberman's Bank at Warren;" some of the stockholders of the Lumberman's Bank at Warren, were citizens of the state of New York. The defendant appeared to the action, by counsel, and having given bond with surety to the court of common pleas, removed the cause to the circuit court of the United States for the western district of Pennsylvania; a motion was made in the circuit court, to remand the cause to the court of common pleas of Warren county, the circuit court having no jurisdiction of the cause, on the ground, that the real party in the suit was the Lumberman's Bank, at Warren, an aggregate corporation, some of the stockholders of the bank being citizens of the state of New York. It was held, that the circuit court had jurisdiction of the case.

The decisions of the supreme court have been uniform. and as declared at the present term in the case of the Commercial and Railroad Bank of Vicksburg *v.* Slocomb, that the courts of the United States cannot exercise jurisdiction when some of the stockholders in a corporation established in one state are citizens of another state of which the party sued by the corporation is a citizen.

A note to be paid "in the office-notes of a bank," is not negotiable, by the usage or custom of merchants; not being a promissory note, by the law-merchant, the statute of Anne, or the kindred act of assembly of Pennsylvania, it is not negotiable by indorsement;¹ and not being under seal, it is not assignable by the act of assembly of Pennsylvania on that subject, relating to bonds. No suit could be brought upon it, in the name of the indorser; the legal interest in the instrument continues in the person in whose favor it was drawn, whatever equity another may have to claim the sum due on the same; and he only is the party to a suit at law on the instrument.

CERTIFICATE of Division from the Circuit Court for the Western District of Pennsylvania. On the 6th of May 1839, a writ of foreign attachment was issued out of the court of common pleas of Warren county, Pennsylvania, in the name of Guy C. Irvine, for the use of the Lumberman's Bank at Warren, against Nathaniel A. Lowry, requiring bail in \$80,000. The action was founded on a promissory note, in the following terms:

"\$53,000.

Warren, Pa., Sept. 6, '37.

"Three months after date, I promise to pay to the order of Guy C. Irvine, Esq., fifty-three thousand dollars, in office-notes of the Lumberman's Bank at Warren, and payable at their banking-house in Warren.

Indorsed on side—GUY C. IRVINE.

N. A. LOWRY."

The sheriff of Warren county attached certain real estate in the county; and also returned that he had attached the goods and chattels of Nathaniel A. Lowry, in the hands of certain persons named in the return. Among the garnishees was Guy C. Irvine.

*On the 24th of October 1839, Nathaniel A. Lowry, the defendant,
*294] presented a petition to the court of common pleas of Warren county

¹ A note for a certain sum, payable in current bank-notes, is not negotiable. *Fry v. Rousseau*, 3 McLean 106. s. p. *Judah v. Harris*, 19 Johns. 144; *Leiber v. Goodrich*, 5 Cow. 186. So, a note executed in Michigan, payable in New

York, in New York funds, is not negotiable. *Harbrook v. Palmer*, 2 McLean 10. s. p. *McCormick v. Trotter*, 10 S. & R. 94; *Wright v. Hart*, 44 Penn. St. 454; *Thompson v. Sloan*, 23 Wend. 71.

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stating that he was, at the commencement of the action, and at the time of filing the petition, a resident and citizen of the state of New York ; and that Guy C. Irvine, the plaintiff in the suit, was, and was at the commencement of the suit, a citizen of the state of Pennsylvania ; and asking the court to accept the security offered for entering his appearance in the circuit court of the United States, and in all things complying with the acts of congress in such cases made and provided ; he prayed the court to proceed no further in the cause, and to allow the removal of the cause to the circuit court of the United States for the western district of Pennsylvania. The court of common pleas granted leave for the removal of the cause to the circuit court ; and the defendant gave a bond with surety, for the entry of the cause in the circuit court.

On the same day on which the petition of Nathaniel A. Lowry was presented to the court of common pleas of Warren county, the affidavits of Robert Falconer, President of the Lumberman's Bank at Warren, and of Walter W. Hodges, were filed. The affidavit of Mr. Falconer stated, that at the date of the note on which the action was founded, he was president of the bank, and the note was received from the defendant, at the time it bore date, as a security for his previous indebtedness to the institution ; and that Guy C. Irvine had not then, nor at any time since, any interest in the said note, except as guarantor for the payment of the same, and the solvency and sufficiency of the maker of the note. The affidavit of Mr. Hodges stated, that William Hall, Vine Elderken, Brown & Buckland, Starkweather & Brown, and sundry other persons, were stockholders in the Lumberman's Bank at Warren ; and at the time of the institution of the suit were citizens of the state of New York, residing in that state.

The case being in the circuit court of the United States for the western district of Pennsylvania, at the November sessions of the court, *Biddle*, for the plaintiff, moved to remand the cause to the court of common pleas of Warren county, for want of jurisdiction. On hearing of this motion before the circuit court, *McCandless*, the counsel for the Lumberman's Bank at Warren, produced to the court an act of the assembly of Pennsylvania, passed the 28th of February 1834, for chartering the bank ; also an act of assembly of Pennsylvania, of 21st March 1813, entitled, "an act to recharter certain banks : " and it was admitted, that the bank commenced the business of banking at Warren, in Pennsylvania, having been organized under the act of 1824. The counsel for the bank also produced the note on which the suit had been brought. The counsel for the bank stated, and the defendant's counsel admitted, that this suit was founded on the note.

"Whereupon, it appearing to the court that this suit is founded on the note aforesaid, dated 6th Sept. 1837 ; that Guy C. Irvine was, at the date of the institution of this suit, a citizen of Pennsylvania, *and that N. A. Lowry was, at the same date, a citizen of the state of New York ; that [*295 said bank was erected, and duly organized, at Warren, in Pennsylvania, under the act of February 28th, 1834, aforesaid ; and that six persons mentioned in the record, and sundry other stockholders thereof, were, at the date of said suit, citizens of the state of New York ; and due consideration being had of the premises, the court are divided in opinion ; one of the judges thereof being of opinion, that this court has no jurisdiction of the case ; that the rule, granted as aforesaid, be made absolute ; and the record of this suit,

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remanded to the court of common pleas of the county of Warren ; the other judge being of opinion, that the court has jurisdiction of the case ; and that the rule granted as aforesaid be denied." The judges of the circuit court certified this division of opinion to the supreme court of the United States.

The case was argued by *McCandless*, for the plaintiff ; and by *Marvin*, for the defendant.

McCandless contended, that Guy C. Irvine is a mere nominal party in the suit, except as guarantor of the sufficiency of Lowry, the defendant. He is one of the garnishees in the attachment ; and he is a competent witness in the cause, under the decisions of the courts of Pennsylvania. The nominal plaintiff, who assigns an obligation, is a competent witness, in an action against the obligor. 9 Serg. & Rawle 20 ; 2 Bro. 171. The courts of Pennsylvania, even after suit brought, allow a party on the record to assign the action, depositing with the clerk enough to cover the costs of the suit. 3 Binn. 306. The reason of this rule is, that in Pennsylvania there are no courts of chancery ; and the assignee of a *chose in action* is, therefore, compelled to bring his suit in the name of the assignor. So also a bankrupt, who has obtained his certificate, and released his claim to the surplus of his estate, may be a witness. 4 Dall. 137 ; 2 Ibid. 172. Cited also, 7 Serg. & Rawle 116 ; 3 Rawle 407 ; Pet. C. C. 308.

This court have decided the question now depending before it. In *Brown v. Strobe*, 5 Cranch 903, it was held, that the courts of the United States have jurisdiction in a case between citizens of the same state, when the plaintiffs are only nominal, for the use of an alien. Who is the real party in this cause ? It is not Guy C. Irvine, but the Lumberman's Bank at Warren. This court have said, they would look at the real parties in the cause. In *Wormley v. Wormley*, 8 Wheat. 421, Mr. Justice STORY says, "this court will not suffer its jurisdiction to be ousted by the mere joinder, or non-joinder, of formal parties." The converse of the proposition is equally true. It has been incontestably shown : 1. That Guy C. Irvine is not a party, or if a party, is only nominal. 2. That the Lumberman's *Bank is the real party. 3. That this court will look at the real *296] parties, for the purpose of entertaining or excluding jurisdiction.

This is the case of a corporation aggregate, part of whose stockholders live in the same state as the defendant. This court has decided, that a corporation aggregate cannot be a citizen, and cannot litigate in the courts of the United States ; unless in consequence of the character of the individuals who compose a body politic. *Hope Insurance Company v. Boardman*, 5 Cranch 57 ; *Bank of the United States v. Deveaux*, Ibid. 61 ; *Breithaupt v. Bank of Georgia*, 1 Pet. 238 ; 1 Paine 410 ; *Corporation of New Orleans v. Winter*, 1 Wheat. 91 ; 1 W. C. C. 146 ; *Bank of Augusta v. Earle*, 13 Pet. 519 ; 1 Kent's Com. 324-6 ; 3 Cranch 267 ; *Commercial and Railroad Bank of Vicksburg v. Slocomb* (ante, p. 60).

Another question arises in this case. This was a foreign attachment—a proceeding *in rem*. Do the provisions of the judiciary act extend to any actions but those *in personam* ? (1 U. S. Stat. 79.) The act of congress gives jurisdiction to the courts of the United States, in cases where "the defendant is an inhabitant, or when he shall be found in the district,

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at the time of serving the process." Lowry was not an inhabitant of the western district of Pennsylvania; nor found there at the time of serving the writ. He was, at the time the writ issued, and afterwards, residing in the state of New York. What is the object of the foreign attachment? It is a proceeding against the lands or goods of a defendant, to compel his appearance. Can a party plaintiff compel the appearance of a defendant in the circuit court, by issuing a foreign attachment? It has been decided that this cannot be done. 2 Dall. 369; Sergeant on Attach. 42.

If a circuit court of the United States cannot have jurisdiction originally, can it have by the removal of a cause from a state court. It was not intended by the 12th section of the judiciary act of 1789, to extend the jurisdiction of the courts of the United States over causes brought before them on removal, beyond the limits prescribed to them originally. Conklin's Treatise 78. No suit can be removed to the national courts, which might not, by the constitution, have been originally commenced in those courts.

As to the construction of the note on which the action was brought, the counsel cited, 1 Pet. 489; 3 Chitty on Commercial and Maritime Law 107.

Marvin, for the defendant.—The question raised in this case has never yet been decided. Four questions have been presented in the argument for the plaintiff; but one only is depending. Has the circuit of the western district of Pennsylvania jurisdiction of the cause? Is the Lumberman's Bank at Warren, the plaintiff in the cause, *or is Guy C. Irvine the plaintiff? On the decision of this point, the case must be decided. [*297 Guy C. Irvine is a citizen of Pennsylvania, and Nathaniel A. Lowry is a citizen and resident of the state of New York; and those are the parties on the record. This brings the case within the provisions of the constitution of the United States.

But, it is said, the court will go beyond the parties named in the suit, and inquire who is beneficially interested. That it is not the only party to the record, which will give or exclude jurisdiction; but the party really interested, and he only, is in the contemplation of the act of congress. In this case, it is said, the action is brought for the bank, because this is so stated on the record. But the act of congress looks only to the parties on the record. Pennsylvania is the only state in the Union in which actions in this form are brought. In New York, no such form of proceeding is known. Would the court, in a case brought here from New York, and standing on the record between parties subject to the jurisdiction of the court, inquire who are the persons really interested in the controversy? Was it necessary in this case to state for whose use the action was brought; and if it was, could issue be taken upon it? If this could be, a collateral issue would be raised; the regular inquiry in the cause would not be pursued. In all other states, the courts will take care that the party really interested has the money which may be recovered. This will be done by the equitable powers of the courts. The legal party in the suit is Guy C. Irvine; and the circuit court, on its law side, will look only to the legal party. The note is not assignable by indorsement, for it is not a negotiable instrument. It is not given for the payment of money, but for the office-notes of the Lumberman's

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Bank. It is not, therefore, within the statutes which make promissory notes negotiable.

It is said, that Guy C. Irvine is not a party in this cause, because he may be a witness. But if he can be a witness, which is denied, it does not follow, that he is not a party. Does the jurisdiction of the court of the United States depend on the legislature, or on the decisions of the courts of the states? In many of the states, a party is a witness to an account; and according to the rule now set up, this would deprive the courts of the United States of jurisdiction in a case between citizens of different states, when an account was the subject of contestation. The cases cited by the counsel for the plaintiff go on the principle, that the party has no interest in the cause, the costs having been paid, and his interest assigned. But in all these cases, he still continues the plaintiff in the cause. The law is not, however, as stated by the plaintiff's counsel. It has been decided by this court, that a party who is a plaintiff in a cause, cannot, by an assignment of the action, and the payment of the costs, become a witness; and *the *298] decision of the circuit court of Pennsylvania has been solemnly overruled. *Scott v. Lloyd*, 12 Pet. 145.

The case cited from 8 Wheat. 421, *Wormley v. Wormley*, was a case in equity; and it rested on its special circumstances. The case cited from 5 Cranch 303, was one in which the bond sued upon was taken officially, for the use of creditors; the bond had been given to a public officer, for the use of creditors. This was, no doubt, averred in the declaration. The real character of the parties was thus apparent on the record. The real party was the creditor.

As to the removal of the cause to the circuit court, it being a foreign attachment, the counsel for the defendant contended, that there is no limitation imposed in the constitution. The act of congress protects suits by parties, not citizens of the same state, or found in the state in which the action, of whatever kind it may be, shall be brought. Act of congress of 1789, § 12; Conklin's Treatise, 78-9. Suits cannot be removed which are not within the constitutional provision.

The affidavits made in the court of common pleas of Warren county, were improperly admitted by that court, and should not be regarded here; nothing in the case can be tried by affidavits of this character.

BALDWIN, Justice, delivered the opinion of the court.—This suit was instituted in the court of common pleas of Warren county, Pennsylvania, whence it was removed to the circuit court for the western district of that state, pursuant to the provisions of the judiciary act of 1789, § 12; and comes before this court on a certificate of division of opinion between the judges of that court, on a motion to remand the cause for want of jurisdiction.

Irvine, in whose name the suit is brought, is a citizen of Pennsylvania; the Lumberman's Bank of Warren is a corporation chartered by a law of that state, and located at Warren; part of the stockholders are citizens of New York, of which state the defendant is also a citizen. The suit is brought upon a paper, of which the following is a copy:

"\$53,000.

Warren, Pa., Sept. 6, '37.

"Three months after date, I promise to pay to the order of Guy C.

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Irvine, Esq., fifty-three thousand dollars, in the office-notes of the Lumberman's Bank at Warren, and payable at their banking-house in Warren, Pa.

Indorsed on side—GUY C. IRVINE.

N. A. LOWRY."

The suit was commenced by the process of foreign attachment, agreeable to the law of Pennsylvania; the property of the defendant was attached according to its provisions: whereupon, he appeared, and, by his counsel, moved for the removal of the cause; and having complied with the requisitions of the judiciary act, the cause was ordered to be removed to the circuit court.

*By thus appearing and submitting to the process of attachment, the defendant waived any privilege to which he was entitled by the [299 section of the judiciary act, as held by this court in *Toland v. Sprague*, 12 Pet. 330-1; so that on his appearance and entry of bail, the attachment was dissolved, and the cause will thenceforth proceed, as if it had commenced by the ordinary process of the court, served on the defendant within the district. The commencement of the action in the common pleas, by attachment, being expressly provided for in the 12th section of the judiciary act, it must be considered, when removed into the circuit court, as an original one.

This brings us to the question raised in the argument of the plaintiff's counsel, whether that court can exercise any jurisdiction over the case, on the ground, that the defendant, and some of the stockholders of the bank, are citizens of New York; which would be a fatal objection to the jurisdiction, if the corporation is to be considered as the plaintiff and sole party in interest. On this subject, the decisions of the court have been uniform, and, as declared in the present term, in the *Vicksburg Bank v. Slocomb*, have settled this point decisively; nothing then remains but to ascertain from the record, as certified, whether the bank is the real plaintiff; for if they are not, then as Irvine is admitted to be a citizen of Pennsylvania, and Lowry, of New York, the jurisdiction is undoubted.

The paper on which the suit is brought, is not negotiable by the usage or custom of merchants; it is payable to order; the promise is to pay so many dollars, but not to pay any certain sum of money; it is a promise to pay the amount "in the office-notes of the Lumberman's Bank at Warren," which are not money, and at most a chattel. Not being a promissory note, either by the law-merchant, the statute of Anne, or the kindred act of assembly of Pennsylvania, it is not negotiable by indorsement; and not being under seal, it is not assignable by the act of assembly on that subject, relating to bonds. The bank, therefore, cannot sue in their own name, in virtue of the indorsement of Irvine in blank; nor could they so sue, if it was specially indorsed to them; because the legal right of action would still remain in Irvine, though the equitable interest in the thing promised may have passed to the bank. This case, however, is not of that description; the only evidence of any transfer of the contents of the note is the blank indorsement of Irvine, and the affidavit of the president of the bank; in the latter of which, it is stated, that the note was received by the bank from the defendant, at the time it bears date, as a security for his previous indebtedness thereto; and that Irvine had not then, or since, any interest in

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said note, except as a guarantor for its payment, and the solvency and sufficiency of the maker.

In referring to the affidavit, we are not to be understood, that whatever may be its contents, they would influence our decision ; yet, assuming the case to be as there stated, the legal right of action is in Irvine ; the *300] paper is not the evidence of an original *debt, contracted by a discount thereof ; or its reception as payment of a pre-existing debt due the bank ; it is only a collateral security, by adding the name of Irvine as indorser. Standing as such to the bank, their rights are derivative through him ; and as the indorsement passes only an equity, the legal interest is in him ; he is the real plaintiff in a court of law, in which legal rights alone can be recognised. This consideration points to the true line of discrimination between this and the case of *Browne v. Strode*, 5 Cranch 303 ; which was a suit against an executor, on his administration bond, given to the justices of the peace of the county where the testator died, and who were citizens of the state of Virginia, as well as the defendant. The jurisdiction of the circuit court was sustained, on the ground, that though the plaintiffs and defendants were citizens of the same state, the former were mere nominal parties, without any interest or responsibility ; and made, by the law of Virginia, the mere instruments or conduits through whom the legal right of the real plaintiff could be asserted ; as such, their names must be used, for the bond must be given to them in their official capacity ; but as the person to whom the debt was due was a British subject, he was properly considered as the only party plaintiff in the action. Whatever right of action existed in virtue of the bond, passed, by the operation of the law of Virginia, directly to the person for whose benefit it was given, through the conduit appointed for that purpose. For such, and kindred cases, the person or officer thus selected by the law as its agent, is not a party to the suit ; and no transfer of the bond or other security to the person interested is necessary, to invest him with a complete legal interest or right of action ; but cases of this description cannot be applied to actions like the present, in which the interest and responsibility of the parties to the paper depends on their contract ; and the law neither dissolves or transfers any legal right of action on or to the party who accepts it as security for payment of a pre-existing debt.

We are, therefore, of opinion, that the circuit court has jurisdiction of the case, and direct that it be so certified.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the western district of Pennsylvania, and on the point and question on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such cases made and provided, and was argued by counsel : On consideration whereof, it is the opinion of this court, that the said circuit court has jurisdiction of the case. Whereupon, it is ordered and adjudged, that it be so certified to the said circuit court accordingly.

UNITED STATES, Plaintiffs in error, *v.* JACOB KNIGHT, BENJAMIN KNIGHT,
ISAAC KNIGHT and EDWARD KNIGHT, Defendants in error.

Jail-limits.

Action on a bond given to the United States for the liberty of the jail-yard, in Portland, in the state of Maine; the condition of the bond was, that J. K. and B. K. "should continue true prisoners in the custody of the jailer, within the limits of the jail-yard." It was agreed by the counsel for the plaintiff and defendants, that J. K. and B. K. had remained within "the limits of the jail-yard," as established under the laws of 1787, of Massachusetts, then prevailing in Maine; the limits of the jail-yard having, in October 1798, been extended over the whole county; but had not remained within the limits established on the 29th May 1787, and existing when the act of congress was passed, 4th January 1800, authorizing persons under process from the United States to have "the jail-limits," as established by the laws of the state: *Held*, that the act of congress of 19th May 1828, gives the debtors imprisoned under executions from the courts of the United States, at the suit of the United States, the privilege of jail-limits in the several states, as they were fixed by the laws of the several states at the date of that act.

Whatever might be the liability of the officer who took the bond from the defendants, if the jail-limits continued to be such as were established under the law of Massachusetts of 1787; the bond not having been taken under that law, and the condition being different from the requirements of those regulations; the parties to the bond, the suit being upon the bond, are bound for nothing whatsoever but what is contained in the condition; whether it be or be not conformable with the law.

The statute of May 19th, 1828, entitled "an act further to regulate processes in the courts of the United States," which proposes only to regulate the mode of proceeding in civil suits, does not divest the public of any right, does not violate any principle of public policy, but on the contrary, makes provision, in accordance with the policy which the government has indicated, by many acts of previous legislation, to conform to state laws, in giving to persons imprisoned under their execution, the privilege of jail-limits, embracing executions at the suit of the United States. *Wayman v. Southard*, 1 Wheat. 10; and *Beers v. Houghton*, 9 Pet. 332, cited and affirmed.

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ERROR to the Circuit Court of Maine. The United States, in 1838, instituted an action of debt against the defendants in error, on a bond executed by them on the 30th day of January 1838, for the sum of \$17,494.04; the condition of which was as follows:

"The condition of the above-written obligation is such, that whereas, the said Jacob and Benjamin Knight have been and now are imprisoned in the prison, at Portland, in the said Maine district, by virtue of an execution issued against them on a judgment obtained against them by the said United States, at the district court of the United States for Maine district, which was begun and holden at Portland, within and for the district of Maine, on the first Tuesday of December, A. D. 1837, for the sum of \$8462.36, principal, and \$161.79 for interest thereon, to the 19th day of December aforesaid, and costs of suit, taxed at \$24.47, and also for all legal interest that may accrue on said sum of \$8462.36, from the said 19th December, until said judgment shall be fully discharged and satisfied, with one hundred cents more, for one writ of execution, and the officer's fees and charges for commitment, taxed at \$97.40. Now, if the said Jacob Knight and Benjamin Knight, from the time of executing this bond, shall continue true prisoners, in the custody of the jailer, within the limits of the jail-yard, until they shall be lawfully discharged, and shall not depart without the exterior bounds of said jail-yard, until lawfully discharged from said im-

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prisonment, according to the laws of the United States in such cases made and provided, and commit no manner of escape, then the said obligation to be void ; otherwise, to remain in full force."

In this case, the parties in the circuit court agreed to the following statement of facts : "On the 30th day of January last past, Jacob and Benjamin Knight were committed to the jail in the city of Portland, on an execution issued on a judgment in favor of the said United States, against said Jacob and Benjamin ; whereupon, the said Jacob and Benjamin, as principals, and Isaac and Edward Knight, as sureties, gave the bond declared on in this suit ; that said Jacob and Benjamin continued to remain within the limits of the town of Portland, exclusive of the islands, and did not depart therefrom, up to the time of the commencement of this suit, nor have they since departed therefrom ; but neither the said Jacob nor Benjamin, from the time of the execution of said bond, nor afterwards, at any time, lodged on the night-time within the walls of said jail, but remained at large within the limits of said town of Portland, exclusive of the islands belonging to the same, both day and night. If, upon the foregoing facts, the court are of opinion, that the condition of said bond has been broken by the said Jacob and Benjamin, and that they have made an escape, then the court are to render judgment to be entered, as of said October term, and as on verdict rendered for the said United States ; and if the court shall be of opinion, that the obligation of the bond has not been broken, then judgment to be rendered, in manner aforesaid, for the said defendants." And each party reserves to themselves the right to a writ of error, to reverse any such judgment, as may, as aforesaid, be rendered by said court in the case.

The justices of the peace of the county of Cumberland, on the 29th May 1787, established the "proper boundaries of the jail-yard in the county, to be—beginning at the bottom of Love lane, at low-water mark ; thence up said lane, including the houses on each side thereof, to the northerly side of Back street ; thence down said Back street, including the houses on both sides thereof, to King street ; from thence down said King street, including the houses on both sides *thereof, to low-water mark ; thence by *303] low-water mark, to the first bounds, including all the grounds and buildings within the aforesaid limits." Afterwards, on the 16th of October 1798, the limits of the jail-yard were extended to "the town of Portland, exclusive of the islands : " and on the 10th of September, the judges of the court of sessions ordered, "that the bounds of the jail-yard be extended over the whole county, and to the exterior limits thereof ; which are hereby fixed and established as the bounds of the jail-yard for the said county of Cumberland."

At the October sessions of the circuit court, judgment, on the facts agreed, was given, that "the obligation of the bond was not broken ; " and the United States prosecuted this writ of error.

The case was argued by *Gilpin*, Attorney-General of the United States, for the plaintiff in error ; and by *Evans*, for the defendants.

Gilpin, for the United States, submitted to the court that the obligation of the bond given by the defendants to the United States was broken : 1. Because they were only entitled, pursuant to the act of congress of 6th January 1800, to the like privileges of the yards or limits of the said jail,

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as persons confined on process from the court of Maine were entitled to at the time that act was passed. (2 U. S. Stat. 4.) 2. Because the privileges of persons confined on process from the courts of Maine, at the time that act was passed, did not extend to the privilege of being outside of the walls of the jail during the night-time.

Mr. Gilpin continued :—The conditions of the bond which the defendants gave to the United States were : 1. That Jacob and Benjamin Knight should continue true prisoners in the custody of the jailer, within the limits of the jail-yard, until they should be lawfully discharged. 2. That they should not depart without the exterior limits of the jail-yard, until lawfully discharged from imprisonment, according to the laws of the United States. 3. That they should commit no manner of escape. A violation of either of these conditions, by Jacob or Benjamin Knight, entitled the United States to a judgment for the penalty of the bond. The facts are, that although neither of them did depart beyond the limits of the town of Portland, exclusive of the Islands, which constituted the boundaries of the jail-yard, yet neither of them did, at any time, lodge at night, within the walls of the jail, but both went at large within the boundaries, during the night as well as the day. The circuit court adjudged that this was no breach of either of the conditions of the bond.

The correctness of this judgment depends upon the meaning of **“true imprisonment,”* and an *“escape”* therefrom. A true imprisonment, under an execution from the courts of the United States, is that which the laws of the United States prescribe, and an act of the prisoner, before his discharge, at variance therewith, is an escape. The United States, not having jails in the states for the custody of their prisoners, recommended to the state legislatures, on the 23d September 1789 (1 U. S. Stat. 96), to make it *“the duty of the keepers of their jails, to receive and safe keep therein, all prisoners committed under the authority of the United States,”* until lawfully discharged ; and to subject them to the same penalties as in the case of prisoners committed under the state laws. To this recommendation, Massachusetts, of which Maine then constituted a part, acceded on the 26th February 1790 (1 Laws Mass. 487) ; thus requiring all prisoners committed under the laws of the United States, to be *“received and safely kept”* in the jails of Massachusetts. On the 5th May 1792 (1 U. S. Stat. 265), congress extended, for a limited period, to persons so imprisoned, *“like privileges of the yards or limits of the jails,”* as persons confined for debt under judgments of the state courts ; but subject also to *“the like regulations and restrictions.”* These privileges they renewed, also for limited periods, in 1794 and 1796 (Ibid. 370, 482), and finally made them permanent by the act of 6th January 1800. (2 Ibid. 4.) Since then, and previous to the present suit, they have passed no additional act upon the subject. The law, therefore, in regard to the imprisonment of debtors of the United States is, that they are to have the same privileges, and be subject to the same restrictions, while in jail, as debtors under process from the state courts had or were subject to, on the 6th January 1800 ; that then, and only then, are they *“truly imprisoned ;”* and that the jailer is subject to the penalties attendant on their *“escape,”* if he allows them any other privileges, or relaxes any of those restrictions.

What, then, were the privileges and restrictions of an imprisoned debtor

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in Massachusetts, in 1800? They were, as declared in the act of 21st February 1785 (1 Laws Mass. 221), that he might have "a chamber and lodging in any of the houses or apartments belonging to the prison, and liberty of the yard within the day-time." These were the privileges of the debtors, and the restrictions upon them : to lodge in any apartment belonging to the jail, and to be at large within the limits of the yard in the day-time. To lodge elsewhere, or to be set at large, even within the limits of the yard, during the night, was not a "true imprisonment;" but clearly amounted to "an escape." The words of the law seem too plain to permit a doubt as to this construction; but if there by any, it is removed by the judicial decisions of the courts of Massachusetts. The rule laid down in the case of *McKeen v. Delancy*, 5 Cranch 32, that the construction given by the state courts to state statutes is to be adopted, has been always upheld by this court. Applied to the present case, it is conclusive. A series of decisions *305] upon this statute has established, as an absolute restriction on the privileges of an imprisoned debtor, that he must lodge in an apartment belonging to the jail; and that he must not be absent from such lodging, or outside of the jail, at night; it has established, that a violation of this restriction is "an escape." *Bartlett v. Willis*, 3 Mass. 105; *Clap v. Cofran*, 7 Ibid. 101; *Freeman v. Davis*, Ibid. 201; *Burroughs v. Lowder*, 8 Ibid. 379; *Trull v. Wilson*, 9 Ibid. 154.

It is thus apparent, that under the laws of Massachusetts, an imprisoned debtor who should lodge outside of the jail, or be absent therefrom at night, would not "remain a true prisoner," but would "commit an escape:" and as the acts of congress of 1789 and 1800, while they extend the same privileges, also impose the same restrictions on debtors imprisoned on process from the courts of the United States; it follows, that Jacob and Benjamin Knight did not "remain true prisoners," but that their acts amount to the commission of "an escape." Consequently, the condition of the bond of the defendants has been broken, and the judgment of the court below is erroneous.

Evans, for the defendants in error, contended, that the condition of the bond in suit had not been broken : 1. Because the act of congress of 6th January 1800, gives to persons imprisoned on execution, at the suit of the United States, the same privileges and liberty of jail-limits as the laws of the states, at the time of such imprisonment, allow to persons confined on processes issuing from the state courts; and by the laws of Maine, in force at the date of the bond in suit, it was not required of persons entitled to the jail-limits, to remain within the walls of the jail in the night-time. 2. Because, by the act of congress of 1828, ch. 68, the same proceedings on writs of execution, issuing from courts of the United states, are required, as were then used in the state courts; and by the laws in Maine, then in force, proceedings on processes issuing from the state courts did not require debtors, who were entitled to the jail-limits, to remain within the walls of the prison at night.

The bond was given stipulating that the debtors to the United States, Jacob Knight and Benjamin Knight, should continue within the limits of the jail-yard, until they should be lawfully discharged, and the agreed facts state, that "they continued to remain within the limits of the town of Portland, exclusive of the islands, and did not depart therefrom, up to the time

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of the commencement of the suit." It is said, that they had not continued within "the limits" which were established when congress passed the act of 23d September 1789, those limits having been established under the laws of Massachusetts, prevailing in Maine, authorizing the use of her jails by the United States, on the 27th of May 1787. It is admitted, the defendants continued, from the time of the execution of the bond, *within the jail-limits established under the laws of Maine, before the bond was given, and in force up to the period at which this suit was instituted. [*306

What laws relative to jail-limits are in force in the state of Maine? The United States do not deny, that if the laws now in force apply to the case of the defendants, they are not liable on the bond. When the state of Maine came into the Union, all the laws of Massachusetts, which had before been in force, were repealed. The act of the legislature of Massachusetts, authorizing the use of her jails by the United States, of 26th February 1790, did not exist. No laws but those of Maine, since she became a state, give to the United States the right to confine her debtors in the jails of that state. Such persons can only be confined in the jails of Maine, according to the laws of Maine.

It is submitted to the court, that the acts of congress of 23d September 1789 (1 U. S. Stat. 96), of 5th May 1792 (Ibid. 265), and the acts of 1794, 1796 and 1800, adopted, prospectively, the legislation of the states as they might from time to time regulate the jail-yards. This is the plain stipulation of the laws. The legislatures of the states stood on a kind of contract. If you will grant to the United States the use of your jails, persons who may be confined at the instance of the United States shall be subject to the regulations of the states.

The construction of the acts of congress which is claimed by the United States, would place citizens of the United States, when sued in the state courts, in a different situation from that in which they would be when under execution by process from the courts of the United States. This would produce discord and dissatisfaction; complaints would be justly urged against the laws of the United States as oppressive. The purpose of the law was to produce harmony. The fair and liberal construction of the legislation of congress on this subject is, that persons confined at the suit of the United States, shall have the same regulations applied to them as are in force in relation to persons imprisoned under process from the courts of the states of the Union.

The acts of congress relating to process in the courts of the United States declare, that the forms of process shall be the same as the forms "now" used in the states. Such has been the construction of the process acts. But in the act of 1789, relative to imprisonment, and in the subsequent acts of congress, there is no such term as "now." The cases which have been cited by the attorney-general, as to the process acts, have, therefore, no application to the imprisonment acts.

It has been questioned, whether congress have the power, constitutionally, to adopt, prospectively, the legislation of states. This is no longer a question; so far as the action of congress can give a construction to the constitution—congress have prospectively adopted the state practice in actions in the circuit courts. *In regulating the militia, congress have adopted, prospectively, the state regulations, and have con- [*307

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sented to the discipline of the militia being under and in conformity with state laws. Exemption from militia duty is determined by the state rules. There is no case in which it has been decided that the powers of the legislation of the United States are not prospective. In the case of the *United States v. Noah*, it was decided, that a "sheriff of a court, under the act of congress of January 6th, 1800, is bound to take a bond for the limits, as provided by the state laws, from a prisoner confined in process from the courts of the United States; and false imprisonment would lie on his refusal." 1 Paine 368. It was also decided in the same case, that "process" in the act includes executions as well as mesne process; and that a bond for the limits, taken by the sheriff from a prisoner under process from the courts of the United States, has in all respects the same incidents, and the like legal effect with a bond taken under the state laws.

The act of the legislature of New York making it the duty of the sheriffs of counties to receive prisoners committed under process from the courts of the United States, was passed in 1801, and this act gave the sheriffs of the state authority to take bonds for the limits. The act of congress authorizing the confinement of the prisoners under process of the United States, was passed on the 6th January 1800. This case fully decides the adoption of the prospective or future legislation of the states, in such matters. This decision has never been questioned.

The bond sued upon in the case before the court, was not taken under the Massachusetts law of 1789. The condition of the bond is, that the persons shall continue true prisoners within the limits of the jail-yard. What is the provision in the law of Massachusetts? Not that prisoners should have liberty of the jail-yard within the limits of the prison. The law of 1789 was, that the person should continue within the limits of the prison; this is not the jail-yard. This will be found fully explained in 3 Mass. 98. The construction which the court will give to this bond will be strict. The action is against the sureties, and they are entitled to all the benefits of such a construction. Cited, 9 Wheat. 680.

The act of congress of 19th May 1828, ch. 68, provides, that writs of execution and proceedings shall be such as the laws of the state shall determine. Proceedings are to be according to the provisions of the state laws. It has been decided in *Beers v. Haughton*, 9 Pet. 329, that proceedings comprehend all the acts after execution. In that case, a discharge by the state law of Ohio discharged the bail. If the interpretation of "proceedings" is not such as is contended for, no power exists to extend the privileges of the jail-limits as regulated by the state laws. If the acts of congress on this subject are not prospective in the new states, no authority of this kind exists. It is submitted, that the act of congress of 1828 extends
 *308] to all *suits by the United States. The provision is as to all process issuing from the courts of the United States; no distinction exists as to suits by the United States. There was a case decided in Massachusetts, where a party confined at the suit of the United States, had the benefit of the poor debtors' act; an act passed after the act of 1789.

Gilpin, Attorney-General, in reply.—The positions attempted to be established on the part of the plaintiffs in error, were these: that if Jacob and Benjamin Knight had not "remained true prisoners," or had committed what amounted to "an escape," in contemplation of the laws of the

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United States, the condition of the bond was broken, and the judgment of the circuit court was erroneous; that the law of the United States ascertaining these points, was the act of 6th January 1800 (2 U. S. Stat. 4), which gave the privileges and adopted the restrictions in regard to imprisoned debtors, which then existed under the state laws; and that these state laws made it "an escape," if the debtor lodged at night elsewhere than in an apartment belonging to the jail, or had remained outside of the jail at night; which it was admitted Jacob and Benjamin Knight had done.

It is contended on the part of the defendants in error, that even if the acts of Jacob and Benjamin Knight did amount to an escape under the state laws thus relied on, yet that the bond now sued upon, was not taken in conformity with those laws; that its condition, instead of being in the words of the statute of Massachusetts, is simply that the party shall not depart without the exterior bounds of the jail-yard, which they have not done; and that, therefore, the condition has not been broken, though they were not within the prison walls at night. To this it is replied, that, even supposing the words of the statute not to have been sufficiently followed, in setting forth, in the bond, the particular condition referred to, yet this objection is met by the last clause, which provides in general terms, that the parties shall "commit no manner of escape." The acts of the parties do clearly constitute "an escape," under the statute in question, and amount to a breach of that condition, so as to render them liable to the penalty, even if they were not so in regard to the other conditions.

It is also contended, that even if the privileges of an imprisoned debtor depend on the act of the 6th January 1800, yet that the construction which limits them to such as were allowed by the state laws, in force at that time, is incorrect. To this it is replied, that the words of the act distinctly adopt the regulations of the states, existing at the time of its passage, and no others; that it could never be the intention of congress, if it were within their constitutional power, to sanction prospective legislation over which they exercised no control; and that, by repeated decisions of this court, it has been held, that in adopting state laws of this character, those only are included which are actually in existence at the time. **Wayman v. Southard*, 10 Wheat. 41; *United States Bank v. Halstead*, Ibid. 59; [*309 *Beers v. Haughton*, 9 Pet. 361; *Wilcox v. Hunt*, 13 Ibid. 378; *Anon.*, Pet. C. C. 1.

But the principal ground taken on behalf of the defendants in error is, that the privileges of imprisoned debtors, at the time this suit was brought, did not depend on the act of congress of 6th January 1800, but on the act of 19th May 1828 (4 U. S. Stat. 278), which declared that "writs of execution and other final process in the courts of the United States, and the proceedings thereon, should be the same as were then used in the state courts." To this it is answered, that the act referred to does not apply to suits in which the United States are plaintiffs; and that if it did, the "proceedings" therein mentioned do not embrace the privileges of the jail-limits, as then used in the states.

It is a settled rule, that in general statutes which regulate the recovery of debts, the government is not bound, unless they are made applicable to it in express terms, or by necessary implication. This is no invidious prerogative right, but a rule founded on well-ascertained public

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policy, necessary to protect the public interests against the negligence of public officers ; and especially to guard the public revenue. It is a rule adopted in many, if not all, the states of this Union, and probably, in most other countries, as well as in the United States ; and it has been sanctioned by repeated judicial decisions. *United States v. Wilson*, 8 Wheat. 256 ; *United States v. Hoar*, 2 Mason 314 ; *United States v. Greene*, 4 Ibid. 433 ; *United States v. Hewes*, Crabbe 307 ; *Stoughton v. Baker*, 4 Mass. 528 ; *People v. Rossiter*, 4 Cow. 143 ; *Commonwealth v. Baldwin*, 1 Watts 54 ; *King v. Allen*, 15 East 340.

The act of 19th May 1828, is certainly not applicable, by its terms, to suits to which the United States are parties ; and the whole course of legislation by congress, in regard to public debtors, refutes any implication that they could intend so to apply it. They have, from the earliest period, specially legislated in regard to the debtors of the United States, and the remedies against them ; although general laws, independent of these, were at the same time in existence and full force, to regulate the proceedings in all suits between individuals. They adopted their own system, in regard to their own debtors ; they have, from time to time, altered and amended that system, without reference to private suits. On the same day, the 6th June 1798, we find two acts of congress passed "for the relief of persons imprisoned for debt ;" the one applicable to private suits, the other to those brought by the United States. (1 U. S. Stat. 561-2.) By the act of 2d March 1799 (Ibid. 676), special and exclusive privileges are given for recovering the amount of unpaid revenue bonds, in suits brought by the United States. On the 6th January 1800, the general provisions of an act for relieving imprisoned debtors, are made applicable to those "imprisoned at the suit of the United States," by express terms. (2 Ibid. 4.) On the *310] *3d March 1817, we have an act of a similar character, limited by its terms to persons indebted to the United States. (3 Ibid. 367.) On the 15th May 1820, on the 3d March 1825, and on the 2d March 1831 (Ibid. 592 ; 4 Ibid. 112, 467), we find acts of congress legislating specially in regard to public debtors ; which show conclusively that they were not embraced within the general provisions for the recovery of debts due from one individual to another. It has been clearly the intention of congress to keep under their own control the course of proceeding against public debtors ; they never intended to blend this with the general regulations they might establish in regard to private suits ; much less can it be conceived, that they intended, that persons indebted, or in default to the treasury of the United States (in relation to whom they had passed so many special laws) should be entitled to every privilege which the laws of each different state might deem it just to extend to a private and individual debtor.

Supposing, however, that the act of 19th May 1828, is to be construed, as embracing, by implication, suits in which the United States are plaintiffs ; yet it is submitted, that the privileges of the jail-limits, which are given to an imprisoned debtor, are not "proceedings on a writ of execution or other final process," within the meaning of that act. The language of the act itself is clear. It is confined to "proceedings on an execution." The privileges of the jail-limits, are in no sense such. Proceedings on an execution are something done by virtue thereof ; something which the writ has directed to be done ; something that "proceeds" between the time that the

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writ issues and is returned. The term, says Chief Justice MARSHALL, "denotes progressive action;" it relates "to the conduct of the officer while in possession of the execution;" it "prescribes his conduct in executing the process." *Wayman v. Southard*, 10 Wheat. 28, 31-2. "The form of the writ," says Judge THOMPSON, "contains, substantially, what is to be done under it;" it is the "duty of the officer to execute the process according to its commands." *United States Bank v. Halstead*, 10 Wheat. 57, 64. These proceedings include, in the language of Judge STORY, "the conduct of the officer in the service of the process, and the exemption of the defendant from arrest." *Beers v. Haughton*, 9 Pet. 362, 368. Such, clearly, is the meaning of "proceedings on an execution;" obedience to the commands of the writ; progressive acts done by the officer of the court in pursuance of its requirement; his return that he has done so: these are the proceedings on the writ, and they are complete when the marshal has so returned it; the writ itself has then become a part of the records of the court, and no further proceeding on it can take place. The defendants have been committed, as the writ directed; the privileges to which they may be entitled are independent of that process; they form no part of the conduct of the marshal; he has nothing to do with them: how then can they be regarded as a portion of his proceedings?

*Such, too, appears to be the evident meaning of the acts of congress, or there has been a system of parallel legislation equally inad- [*311
vertent and unnecessary. The object of the act of the 19th May 1828, is, by its title, "to regulate processes;" and it relates to the "proceedings on final process." Now, if these words include within them the privileges of jail-limits given by the state laws to an imprisoned debtor, then were the acts of congress of 30th May 1794 (1 U. S. Stat. 370), of 28th May 1796 (1 Ibid. 482), and of 6th January 1800 (2 Ibid. 4), totally useless; since at the time each of these laws was passed, the former act "to regulate processes," passed on the 8th May 1792 (1 Ibid. 275), was in full force; and embraced the "proceedings on final process," in language even more full than that of the act of 19th May 1828. Is it conceivable, that if congress considered the words of the act of 8th May 1792, which direct that "the modes of proceeding in suits shall be the same as were then used in the state courts," as embracing the privileges of the jail-limits, to which a debtor was entitled by the state laws; they would have passed the acts of 1794, 1796 and 1800, for the express purpose of conferring those privileges? Again, the titles of the acts show conclusively that their objects were different. The acts of 8th May 1792, and 19th May 1828, are stated to be acts for the regulation of processes; those of 1794, 1796 and 1800, are stated to be for the relief of imprisoned debtors, and they clearly arise out of the resolution of congress, of 23d September 1789 (1 U. S. Stat. 96), which placed the prisoners of the United States in state jails; and were intended to put them on the same footing, with respect to the mode of imprisonment, as other debtors then were.

The same distinction may, it is thought, be traced in the decisions of this court upon the language of these acts. When its opinions are attentively examined, it will not be found, that it has ever considered the privileges of the jail-limits, given by the act of 6th January 1800, as embraced in the process acts. In the case of *Randolph v. Donaldson*, 9 Cranch 85, the

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custody of a prisoner, after his commitment, was held to be a matter with which the marshal had nothing to do ; although the act of 24th September 1739, directs that officer to execute all process, and consequently, devolves upon him every act which can be regarded as a proceeding thereon. In the case of *Wayman v. Southard*, 10 Wheat. 20, the whole scope of the opinion refers to the conduct of the marshal, while the writ is in his hands, as constituting his "proceedings on the execution." It speaks, in express terms, of the act of 1800, as that which authorizes the marshal to allow the benefit of prison-rules, to those who are in custody under process issued from the courts of the United States, in the same manner as to persons imprisoned under state process ; it refers to the previous temporary laws having the same object in view ; and it alludes, with evident doubt, to an argument deriving this authority from the process act. 10 Wheat. 35. The facts of *312] that case also show the nature of the proceedings ; they were *the correctness of the marshal's mode of sale under a *fiери facias* ; the correctness of the return made by him ; the question whether or not he had obeyed the commands of the writ. In the case of the *Bank of the United States v. Halstead*, 10 Wheat. 54, a similar question was involved ; it related to the propriety of the marshal's conduct, and whether or not he had proceeded correctly in his mode of executing the process. The case of *Beers v. Haughton*, 9 Pet. 356, arose expressly on the mode of proceeding by the marshal under an execution. He was directed by the writ to arrest a person ; he found him to be exempted by the state laws from arrest ; his return to that effect was held to be proper ; his proceedings were strictly proceedings on the execution ; the person he was ordered to arrest was, in point of fact, legally discharged from custody, as completely as if he had paid the debt ; and the marshal so made his return. So far as the proceeding on the execution was involved, it was in no respect similar to the privilege of the jail-limits ; the latter is a mere incident to the custody of the debtor, whether granted or not, the proceedings under the writ go on ; it does appear upon the record ; it does not affect in any way the discharge or satisfaction of the debt.

It thus appears, that whether we take the words and plain intent of the act of 19th May 1828 ; or the general scope of legislation by congress, in regard to processes, and to the imprisonment of debtors ; or the course of judicial decision, as applied to the proceedings of a marshal in the execution of final process ; the provisions of that act cannot be properly considered as embracing the privilege of jail-limits, or as applicable to the present case. That case must depend on the provisions of the act of 6th January 1800 ; which, by subjecting the defendants to the laws of Massachusetts, then in existence, deprives them of the privilege to which they would have been entitled, had they not failed to comply with the terms prescribed by that law, which are also the conditions mentioned in the bond.

BARBOUR, Justice, delivered the opinion of the court.—This case came before us upon a writ of error to the circuit court of the United States for the district of Maine. It was an action brought upon a bond given to the United States, in the year 1838, for the liberties of the jail-yard in Portland. The general issue was pleaded, with leave to give special matter in evidence. The condition of the bond, after reciting that Jacob Knight and

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Benjamin Knight have been, and now are, *imprisoned in the prison, at Portland, in Maine district, by virtue of an execution issued against them, on a judgment obtained against them by the United States, at the district court of the United States for the Maine district, &c., proceeds as follows : "Now, if the said Jacob Knight and Benjamin Knight, from the time of executing this bond, shall continue true prisoners, in the custody of the jailer, within the limits of the jail-yard, until they shall be lawfully discharged, and shall not depart without the exterior bounds of said jail-yard, until *lawfully discharged from said imprisonment, according to the [*313 laws of the United States in such cases made and provided, and commit no manner of escape, then the said obligation to be void ; otherwise, to remain in full force."

The parties agreed to a statement of facts, as follows : "On the 30th of January last past, the said Jacob and Benjamin were committed to the jail in the city of Portland, on an execution issued on a judgment in favor of the United States, against said Jacob and Benjamin ; whereupon, the said Jacob and Benjamin, as principals, and the said Isaac and Edward, as sureties, gave the bond declared on in this suit ; that Jacob and Benjamin continued to remain within the limits of the town of Portland, exclusive of the islands, and did not depart therefrom, up to the time of the commencement of this suit, nor have they since departed therefrom ; but neither the said Jacob nor Benjamin, from the time of the execution of said bond, nor afterwards at any time, lodged in the night-time within the walls of said jail, but remained at large within the limits of said town of Portland, exclusive of the islands belonging to the same, both day and night." Upon this agreed state of facts, the court gave judgment for the defendants : to reverse which, this writ of error is brought.

It appears from the record, that at a court of general sessions of the peace, for the county of Cumberland, within which Portland is situated, held in the year 1798, the limits of the town of Portland, exclusive of the islands, were fixed and determined, as the boundaries of said jail-yard ; and that the court of sessions at Portland, in the year 1822, extended the bounds of the jail-yard over the whole county, and to the exterior limits thereof. It appears also, from the facts agreed, that Jacob and Benjamin Knight continued to remain within the town of Portland, exclusive of the islands, without ever having departed therefrom ; but that neither of them lodged in the night-time, within the walls of the jail, but went at large, both day and night, within the limits of the town of Portland, exclusive of the islands.

Upon this state of facts, it has been contended by the attorney-general, that the imprisoned debtors were guilty of an escape ; because they were not within the walls of the jail in the night-time ; although they always continued, both day and night, within the limits of the jail-yard. It is said, that the only act of congress in force, at the date of the bond in question, which entitled the parties to the privileges of jail-yards, when imprisoned on process issued from any court of the United States, at the suit of the United States, was the act of the 4th January 1800 ; which enacts, "that persons imprisoned on process issued from any court of the United States, as well at the suit of the United States, as at the suit of any person or persons, in civil actions, shall be entitled to like privileges of the jails,

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or limits of the respective jails, as persons confined in like cases on process from the courts of the respective states are entitled to, and under the like regulations and restrictions." That *this act of congress only *314] adopted the state laws then in force; that by the law of Massachusetts (of which Maine was then a part), then in force, as construed by her courts, it was an escape for a debtor, having the liberty of the yard, to be without the walls of the prison in the night-time; although he was within the limits of the yard. It is certainly true, that this court has construed the acts of congress adopting state laws in relation to writs and processes, and the proceedings thereon, as applying to the state laws then in force. 10 Wheat. 1, 51; 9 Pet. 331. It is also equally clear, that the construction of the laws of Massachusetts then in force, as to the debtor being without the walls of the prison during the night-time being an escape, is such as has been stated; the decisions cited at the bar fully show it.

Whilst, however, we admit these premises, we cannot yield our assent to the conclusions drawn from them. If it were even conceded, that the act of Massachusetts of 1784, was in force at the date of the execution of the bond in question; although it would subject the officer to liability, yet it would not have affected these parties. From the language of that act, a person imprisoned for debt, was allowed to have a chamber and lodging in any of the houses, or apartments belonging to the prison, and liberty of the yard within the day-time. It was the construction put on these words, which made it necessary for the debtor to be within the walls of the prison in the night-time. In the bond in question, there is no such language. Whilst, therefore, the officer might have been liable for taking from the debtor a bond, not in conformity with the statute, but extending to him a greater privilege than was allowed by law; yet in this case, the suit being on the bond, the parties are bound for nothing whatsoever, but what is contained in the condition of the bond, whether it be or be not conformable with the law. The condition of this bond is satisfied, by the parties not departing without the exterior bounds of the jail-yard, whether they are within the prison walls in the night-time, or not; and it appears from the agreed case, that they did not depart without those bounds; there was then no breach of the condition of the bond.

But we now proceed to the consideration of another question of very great practical importance in the courts of the United States; and that is, whether the act of 1828, May 19th, entitled an "act further to regulate processes in the courts of the United States," has not, since its passage, regulated the right of imprisoned debtors to the privilege of the jail liberties? The third section of that act is in the following words: "And be it further enacted, that writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, as are now used in the courts of such state," &c.; with a proviso, "that it shall be in the power of the courts, if they see fit, in their discretion, by rules of *315] courts, so far *to alter final process in said courts, as to conform the same to any change which may be adopted by the legislatures of the respective states, for the state courts."

It is first objected, that whatsoever may be the construction of this section, as now governing executions, in case of other parties, yet it does not

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embrace those issued on judgments rendered in favor of the United States ; and this, upon the ground that the United States are never to be considered as embraced in any statute, unless expressly named. The words of this section being, "that writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States ;" it is obvious, that the language is sufficiently comprehensive to embrace them ; unless they are to be excluded, by a construction founded upon the principle just stated. In *Bac. Abr.*, tit. *Prerogative*, 3-5, it is said, that the general rule is, that where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such act, though not particularly named therein. But where a statute is general, and thereby any prerogative, right, title or interest is divested or taken from the king, in such case he shall not be bound ; unless the statute is made by express words, to extend to him. It is a settled principle, that the king is not, ordinarily, barred, unless named by an act of limitations. The principle expressed in the maxim, *nullum tempus occurrit regi*, rests upon the ground, that no *laches* shall be imputed to him. The doctrine, that the government should not, unless named, be bound by an act of limitations, is in accordance with that just cited from Bacon, because if bound, it would be barred of a right ; and in all such cases, is not to be construed to be embraced, unless named, or what would be equivalent, unless the language is such as to show clearly that such was the intent of the act. The same principle has been decided in New York, Massachusetts, Pennsylvania and, no doubt, in other states ; and all upon the same ground. Not upon any notion of prerogative ; for even in England, where the doctrine is stated under the head of prerogative, this, in effect, means nothing more than that this exception is made from the statute, for the public good ; and the king represents the nation. The real ground is a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided. Without undertaking to lay down any general rule as applicable to cases of this kind, we feel satisfied, that when, as in this case, a statute which proposes only to regulate the mode of proceeding in suits, does not divest the public of any right, does not violate any principle of public policy ; but on the contrary, makes provisions in accordance with the policy which the government has indicated by many acts of previous legislation, to conform to state laws, in giving to persons imprisoned under their execution, the privilege of jail-limits ; we shall best carry into effect the legislative intent, by construing the executions at the suit of the United States, to be embraced within [*316 the act of 1828.

Having come to this conclusion, it only remains to inquire, whether the words in the act of 1828, "the proceedings thereupon" (that is, on executions), embrace, as a part of those proceedings, the rights of an imprisoned debtor to have the privilege of the jail-limits ? Upon this question, we are relieved from the necessity of argument, by the decisions of this court. In the case of *Wayman v. Southard*, this court was expounding the meaning of the words, "modes of proceeding," in the process act of 1792 ; and the question was, whether these words included "proceedings on executions." They decided, that they did ; but the act of 1828, passed after the decision

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of the case of *Wayman v. Southard*, adopted the very terms, "proceedings on executions," because the expression is, "proceedings thereupon," referring to executions, which had just preceded it. And the reasoning of the court in *Wayman v. Southard*, proves clearly, that these last words would include proceedings by debtors to obtain the privilege of the jail liberties. In the same case of *Wayman v. Southard*, it was objected, that the process act of 1792 ought not to be construed as embracing the proceedings on executions, because if it did, it would furnish the rule as well for writs of *capias ad satisfaciendum*, as of *feri facias*; and that the marshal would be as much bound to allow a prisoner the benefit of the rules, under the act of congress of 1800, as to sell upon the notice, and on the credit prescribed by the state laws; and that as the act of 1800 had, by separate and distinct legislation, provided for the jail-limits, congress could not be supposed to have provided for the same subjects in the process act. But the court considered this separate provision as to the jail-limits, merely as a cumulative act of legislation, with a view to remove doubts that might have arisen from the jails in which prisoners were confined not belonging to the United States. And this answers the argument urged at the bar, upon the ground of the several acts which especially provided for jail liberties, against the construction of the act of 1828; which would extend to embrace the privilege of jail liberties, within the terms, "proceedings thereupon," that is, on executions. In *Beers v. Haughton*, 9 Pet. 362, this court, in construing this very act of 1828, say, "the words, the proceedings on writs of execution, and other final process, must, from their very import, be construed to include all the laws, which regulate the rights, duties and conduct of officers, in the service of such process, according to the exigency, upon the person or property of the execution-debtor; and also, all the exemptions from arrest or imprisonment under such process, created by those laws. This quotation covers the whole ground of controversy, on the effect of these words, "proceedings thereupon." We are of opinion, therefore, that the act of 1828 gives to debtors imprisoned under executions, from the *317] courts of the United States, at the suit of the *United States, the privilege of the jail-limits in the several states, as they were fixed by the laws of the several states at the date of that act.

We give no opinion, whether that act would extend so far as to enable the imprisoned debtors of the United States to avail themselves of the benefit of the insolvent laws of the states; as the question does not arise in this case.¹ Upon the whole view of the case, we think the judgment of the circuit court correct, and it is, therefore, affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maine, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

¹ See *Hopkins's Case*, 2 Curt. 567.

*SAMUEL L. FOWLER, Plaintiff in error, v. HARRIS BRANTLY and others,
Defendants in error.

Customs of banks.—Over-due paper.

Action on a promissory note for \$2000, made for the purpose of being discounted at the Branch Bank at Mobile, payable to the cashier of the bank or bearer, and upon which was written an order to credit the person to whom the note was sent, to be by him offered for discount to the bank, for the use of the makers, the order being signed by all the makers of the note. The bank refused to discount the note, and it was marked with a pencil mark, in the manner in which notes are marked by the bank which are offered for discount; the agent of the makers to whom the note was intrusted to be offered for discount, put it into circulation, after indorsing it; having disposed of it for \$1200, for his own benefit, without the knowledge of the makers; and communicated to the purchaser of the note, that it had been offered for discount, and rejected by the bank; the note was afterwards given to other persons in part payment of a previous debt, and credit for the amount was given in the account with their debtors. The form of the note was that required by the bank when notes are discounted, and had not been used, before it had been so required by the bank. The circuit court instructed the jury that the plaintiff was not entitled to recover from the makers of the note: *Held*, that the instruction was correct.

The known custom of a bank, and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, enter into the contract of those giving notes for the purpose of having them discounted at such bank; and the parties to the note must be understood as having agreed to govern themselves by such customs and modes of doing business; and this, whether they had actual knowledge of them or not; it was the especial duty of all those dealing with the note to ascertain them, if unknown. This is the established doctrine of the supreme court, as laid down in *Renner v. Bank of Columbia*, 9 Wheat. 581; in *Mills v. Bank of the United States*, 11 Ibid. 431; and in *Bank of Washington v. Triplett*, 1 Pet. 32.

A note over-due, or a bill dishonored, is a circumstance to put those dealing for it afterwards on their guard; in whose hands it is open to the same defences it was in the hands of the holder, when it fell due. After maturity, such paper cannot be negotiated.¹

ERROR to the Circuit Court for the Southern District of Alabama. In the circuit court of Alabama, an action was instituted on a promissory note, by the plaintiff in error, against the defendants; and a verdict and judgment were entered for the defendants. The plaintiff took exception to the charge of the court, and prosecuted this writ of error. The facts of the case, and the matters which were the subjects of the exceptions taken to the rulings of the court, are fully stated in the opinion of the court.

The case was argued, at January term 1839, by *Ogden*, for the plaintiff in error; and by *Van de Graff*, for the defendants. It was held under advisement, for a reference to a statute for Alabama, until this term.

CATRON, Justice, delivered the opinion of the court.—This is an action of *assumpsit*, by the assignee of a note against *the makers. The question of law arising in this cause depend on the construction of a note of hand, in the following words: [*319]

¹ See *Goodman v. Simonds*, 20 How. 366; 94 Id. 758; *Bruen v. Spofford*, 95 Id. 483; *Bank of Pittsburgh v. Neal*, 22 Id. 108; *Angle Parsons v. Jackson*, 99 Id. 441; *Swift v. Smith*, v. Ins. Co., 92 U. S. 342; *Collins v. Gilbert*, 102 Id. 444-5.

Fowler v. Brantly.

"Selma, Dallas County, Alabama, March 1st, 1836.

"Eleven months after date, we, Harris Brantly Peyton, S. Graves and Hugh Ferguson, jointly and severally, promise to pay Andrew Armstrong, cashier, or bearer, two thousand dollars, value received, negotiable and payable at the Branch Bank of the state of Alabama, at Mobile.

"Credit, Diego McVoy.

HARRIS BRANTLY,
PEYTON S. GRAVES,
HUGH FERGUSON."

HARRIS BRANTLY,
PEYTON S. GRAVES,
HUGH FERGUSON."

The note had on it the two indorsements of Diego McVoy and William D. Primrose; and that of Taulmin, Hazard & Company was stricken out. On the face of the note there was, in pencil, the figures 169.

The defendants, the three makers, introduced evidence to prove that the note, in its present form (except the indorsements), was sent by one of the makers to McVoy, who was his factor in Mobile, to be offered for discount in the Branch Bank of the State, in that city, as an accommodation note; the proceeds of which were to be forwarded to said makers. That the note was offered for discount and rejected. The factor then proposed to raise money on the note, for his own use, without the knowledge of the makers, and intended to conceal the appropriation of the note from them. The first person to whom he offered to sell the note, deemed the attempt a fraud, and refused to purchase. McVoy then indorsed and transferred the note to Primrose, for \$1200, communicating to him, it had been offered for discount at the bank and rejected. Taulmin, Hazard & Company held a note for \$3250, on Black, indorsed by Vail & Dade, and by Primrose, and which was past due; to discharge which, in part, Primrose transferred the note in controversy to Taulmin, Hazard & Company; and the latter indorsed the same, before its maturity, to the plaintiff, Fowler, and received credit on their account; they being largely indebted to him at the time.

The leading feature in the cause, involving the principle on which it turns, is this: the note was in the form prescribed by the bank to those who desired accommodations at it; which form was not in use, before its adoption there. The memorandum on the left hand side of the note, and signed by the makers, was designed to show the officers of the bank to
*320] whose credit the money was to be placed, *should the note be discounted; and by the usages of the bank, no other person than the one thus named could receive the money. Primrose testified, he knew from the pencil mark on the face of the note, it had been offered for discount and refused, when he purchased it. The cashier proved the pencil mark was made according to the usage of the bank on all notes offered for discount and refused.

To a part of the first instruction, that held, if the plaintiff took the note in payment of a pre-existing debt, due to him from Taulmin, Hazard & Company, then the jury ought to find for the defendants, exception is taken; and the court refused to instruct the jury, that if the plaintiff took the note fairly, in payment of a debt due to him, before its maturity, without notice of the purpose for which McVoy had held it, then he was entitled to recover. And also refused to instruct, if the jury believed plaintiff took the note *bond fide*, in payment of a previous debt, that he

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had no notice of any fraud, and there were no circumstances to put him upon an inquiry into any fraud committed on the part of McVoy, he was entitled to recover. There were other instructions asked, and refused; but as they are in effect the same as those recited, an answer to which will cover the whole case, they need not be further noticed.

The known customs of the bank, and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, were matters of proof, and entered into the contract; and the parties to it must be understood as having governed themselves by such customs and modes of doing business; and this, whether they had actual knowledge of them, or not; and it was especially the duty of all those dealing for the paper in question to ascertain them, if unknown. Such is the established doctrine of this court, as laid down in *Renner v. Bank of Columbia*, 9 Wheat. 581; *Mills v. Bank of the United States*, 11 Ibid. 431, and *Bank of Washington v. Triplett*, 1 Pet. 32-3.

The note sued on is peculiar in its form; it was made for the purposes of discount, and only intended for negotiation at the bank, and not for circulation out of it. The pencil mark on its face, when sold, was common to all rejected paper, and was put there by the officers of the bank, as evidence of the fact that it had been offered and rejected; and those dealing for it, with the mark on its face, must be presumed to have had knowledge what it imported; as the slightest inquiry would have ascertained its meaning. These were the legal presumptions attached to the contract, when the plaintiff purchased it; and the explanatory evidence to prove the customs of the bank, was introduced to enlighten the court and jury in regard to the rules governing the transaction, and furnishing the law of the case; and which the plaintiff, when he purchased the paper, is presumed to have known and understood; as the court knew and understood it, after it was proved on the trial.

This was the case, made up of law and fact, on which the court *was asked to charge the jury; and not the abstract proposition, [*321 whether, on a proper construction of the statutes of Alabama, negotiable paper, payable in bank, purchased *bonâ fide*, and without notice of an existing infirmity, but taken in discharge of a pre-existing debt, carried the infirmity with it into the hands of the purchaser; for the reason, that the mode of payment was not in the usual course of trade. A note over-due, or bill dishonored, is a circumstance of suspicion, to put those dealing for it afterwards on their guard; and in whose hands it is open to the same defences it was in the hands of the holder when it fell due. 13 Pet. 79. After maturity, such paper cannot be negotiable "in the due course of trade;" although still assignable. So, the paper before us carried on its face circumstances of suspicion, so palpable as to put those dealing for it, before maturity, on their guard; and as to require at their hands strict inquiry into the title of those through whose hands it had passed. Failing to be thus diligent, they must abide by the misfortune their negligence imposed, and stand in the condition of McVoy. As between him and the defendants, there was no contract or liability on their part; nor as bearer of the note, could he lawfully pass it off in the due course of trade, so as to communicate a better title to another; the face of the paper betraying its character and purposes, and McVoy's want of authority.

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All the rulings of the court below must be referred to this paper, and to the special case made by the proofs. Any instruction asked, which cannot be given to the whole extent asked, may be simply refused; or it may be modified, at the discretion of the court. No instruction was asked, that could have been lawfully given; to every one, the court could well say, and did in substance say, that under no circumstances could a purchase of this note be made by the plaintiff, from Taulmin, Hazard & Company, so as to exempt it in the hands of the assignee, from the infirmity it was subject to, in the hands of McVoy. And in regard to the last part of the first instruction, where the jury is in substance told, that if they believed the note was taken in payment of a pre-existing debt, due to plaintiff, from Taulmin, Hazard & Company, still they should find for the defendants: the court might have gone further, and instructed the jury, that neither could the plaintiff recover had the note been purchased *bonâ fide*, and without notice of the fraudulent conduct of McVoy. The judgment is, therefore, ordered to be affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of Alabama, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*322] *JOHN F. GAMES and NATHAN GILBERT, Plaintiffs in error, *v.* JOHN STILES, *ex dem.* WALTER DUNN, deceased, Defendant in error.

Execution of deed.—Charge on matters of fact.—Names.—Sale for taxes.—Ejectment.

A deed was executed in Glasgow, Scotland, by which land in Ohio, which had been patented to David Buchanan, by the United States, was conveyed to Walter Sterling; the deed recited, that it was made in pursuance of a decree of the circuit court of the United States for the district of Virginia; no exemplification of the decree was offered in evidence in support of the deed: The court *held*, that as Buchanan was the patentee of the land, although he made the deed in pursuance of the decree of the circuit court of Virginia, the decree could add nothing to the validity of the conveyance; and therefore, it was wholly unnecessary to prove the decree; the deed was good without the decree.

The possession of a deed, regularly executed, is *primâ facie* evidence of its delivery; under ordinary circumstances, no other evidence of the delivery of a deed than the possession of it, by the person claiming under it, is required.¹

The grantor in the deed was David Carrick Buchanan; and he declared in it, that he was the same person who was formerly David Buchanan. The circuit court were required to charge the jury, that it was necessary to convince the jury, by proofs in court, that David Carrick Buchanan was the same person as the grantor named in the patent, David Buchanan; and that the statement by the grantor was no proof to establish the fact; the circuit court instructed the jury, that they must be satisfied from the deed and other documents, and the circumstances of the case, that the grantor in the deed was the same person to whom the patent was issued; and they declared their opinion that such was the fact. The principle is well estab-

¹ Flagg *v.* Mann, 2 Sumn. 489; Rhine *v.* Robinson, 27 Penn. St. 30; Story *v.* Bishop, 4 E. D. Sm. 423; Carnes *v.* Platt, 9 J. & Sp. 435. So, the recording of a deed, in the absence of opposing evidence, justifies a pre-

sumption of delivery. Younge *v.* Guilbeau, 3 Wall. 636; Ten Eyck *v.* Perkins, 2 Wend. 308; Rigler *v.* Cloud, 14 Penn. St. 361; Kille *v.* Ege, 79 Id. 15.

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lished, that a court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of opinion, in regard to the fact. When a matter of law is given by the court to the jury, it should be considered by the jury as conclusive; but a mere matter of opinion as to the facts, will only have such influence on the jury as they may think it entitled to.¹

The law knows of but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial; it is competent for the party to show that he is known as well without as with the middle name.²

A deed of lands sold for taxes cannot be read in evidence, without proof that the requisites of the law which subjected the land to taxes had been complied with; there can be no class of laws more strictly local in their character, and which more directly concern real property, than laws imposing taxes on lands, and subjecting the lands to sale for unpaid taxes; they not only constitute a rule of property, but their construction by the courts of the state should be followed by the courts of the United States, with equal, if not with greater, strictness than any other class of laws.

The supreme court of Ohio has required a claimant under a tax title to show, before his title can be available, a substantial compliance with the requisites of law.

In an action of ejectment, the defendants having entered into the consent rule, the plaintiff, in Ohio, is not to be called upon to prove the calls of the patent under which he claims, on the ground of establishing the different corners; the defendants are bound to admit, after they have entered into the consent rule, that they are in possession of the premises claimed by the lessor of the plaintiff.

Dunn v. Games, 1 McLean 321, affirmed.

¹In most of the states, the usages of the English courts of justice have been adopted, where the judge always sums up the evidence and points out the conclusions which, in his opinion, ought to be drawn from it; submitting them, however, to the consideration and judgment of the court; and in such states, it is not improper for the circuit court to follow the same practice. *Mitchell v. Harmony*, 13 How. 131. The judge may express his opinion on the weight of evidence, and in cases where the jury are likely to be influenced by their prejudices, it is well for him to do so. *Insurance Co. v. Rodel*, 95 U. S. 238. Care must be taken, that the jury is not misled into the belief, that they are alike bound by the views expressed upon the evidence, and the instructions given as to the law. They must distinctly understand, that what is said as to the facts, is only advisory, and in no wise intended to fetter the exercise finally of their own independent judgment. Within these limitations, it is the right and duty of the court to aid them, by recalling the testimony to their recollection, by collating its details, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends, in every case, upon the discretion of the judge. There is no more important duty resting upon those who preside at jury

trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well, without this aid; in such cases, chance, mistake or caprice may determine the result. *SWAYNE, J.*, in *Nudd v. Burrows*, 91 U. S. 439. And see *Consequa v. Willings, Pet.*, C. C. 225; *United States v. Fourteen Packages*, Gilp. 235; *United States v. Sarchet*, Id. 273. But if the language of the court be intemperate and unfair, though it do not withdraw the facts from the consideration of the jury, it is ground of reversal. *Linn v. Commonwealth*, 96 Penn. St. 288. The language of hyperbole is suited for the purpose of the advocate, who would enforce his thought by striking and intense expressions, in order to deepen its effect, and by the exaggeration lead the minds of his hearers into the fever of his own heated fancy; but weak and inconclusive facts, when thus prescribed by a judge, can only mislead. Jurors, catching the tone and temper of their conclusions from the strong and figurative style of the judge, fail to give to the facts their true weight, which a cool and fair statement is calculated to produce. *AGNEW, C. J.*, in *Coxe v. Deringer*, 82 Penn. St. 258. And see *Pistorius v. Commonwealth*, 84 Id. 158; *Stokes v. Miller*, 10 W. N. C. 241.

²*Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Gardinier*, 2 Cow. 463; *Milk v. Christie*, 1 Hill 102; *Aylesworth v. Brown*, 10 Barb. 167; *Van Voorhis v. Budd*, 39 Id. 479; *Claffin v. Griffin*, 8 Bosw. 689; *Clute v. Emerick*, 26 Hun 10.

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ERROR to the Circuit Court of Ohio. In 1836, the lessee of the defendants in error instituted an action of ejectment against the plaintiffs in error, in the circuit court of the United States for the district of Ohio, for a tract of land lying between the little Miami and Scioto rivers, in that part of the state of Ohio known as the Virginia military district, being on a survey *323] under a part of a military land-warrant for 1000 acres. The cause was tried at July term 1838, and a verdict and judgment were entered for the plaintiffs in the action, the defendant in error.

On the trial of the cause, the defendant tendered a bill of exceptions, which stated, that the plaintiff offered in evidence in support of his action :

1st. A certified copy of a deed from David Carrick Buchanan to Walter Sterling, dated June 27th, 1825. The patent from the United States, dated 22d May 1802, for the land in controversy, was granted to David Buchanan by the president of the United States, and the deed was executed by David Carrick Buchanan, stating that he had formerly been David Buchanan. The defendants asked the court to instruct the jury, that the statement in the deed by the grantor, that he had formerly been David Buchanan, was no proof that he was David Carrick Buchanan. This instruction the court refused. The deed from David Carrick Buchanan recited, that the deed was executed in conformity with a decree of the circuit court of the United States for the fifth circuit, in the Virginia district, to convey the land described in it to Walter Sterling, in fee-simple. The defendants excepted further to the introduction of the deed in evidence, because the proceedings of the circuit court of the United States in Virginia, recited in the deed, were not produced with it. But the court overruled the objection.

2d. The defendants in their defence offered in evidence a certified copy of a paper, purporting to be a deed from William Middleton, auditor of Brown county, to John S. Wills, bearing date, April 22d, 1824, for 200 acres of land ; and insisted, it was duly acknowledged as such deed, and such copy was duly certified by the recorder of Brown county. The deed from William Middleton, the auditor of Brown county, recited, that a sale had been made of 200 acres of land, by William Middleton, county auditor, to John S. Wills, on the 29th December 1823, for arrearages of taxes due to the state of Ohio, for 1821, 1822, 1823, for the lands conveyed ; the land being part of the land patented to Buchanan. The deed particularly described, by metes and bounds, the tract conveyed, and granted the same to John S. Wills, in fee-simple. It was duly acknowledged according to the laws of Ohio, and recorded in the proper office. The plaintiff objected to this deed, as not competent to go to the jury, without evidence of the proceedings and acts of the public officers, prior to and at the sale of said land for the tax ; and insisted, it ought not to be admitted ; and the court sustained the objection, and overruled the evidence, and declared their opinion, that the same evidence should not be admitted, and the same was rejected accordingly.

The defendants then offered the same deed, or copy of deed, accompanied by a duly certified copy of the record of the proceedings, at and before the sale of said land for taxes, bearing date, 9th May 1838, certified *324] by Hezekiah Lindsey, county auditor of said county *of Brown ; which copies or papers, and certificates thereon, were referred to as a part of the bill of exceptions ; whereupon, the plaintiffs, by counsel, objected

to the admission of the same, on the ground, that the same did not contain all the legal requisites to justify and authorize said sale and conveyance of said land for taxes ; and of this opinion was the court, and declared their opinion to be, that the same ought not to be admitted in evidence in this case, and the same were rejected accordingly.

The defendants below gave in evidence a transcript of the record of the proceedings and decree of the supreme court of the state of Ohio, in a case wherein White's heirs and J. S. Wills' heirs, and H. Brush, were complainants, and David Buchanan, in his lifetime, was defendant ; and his unknown heirs, after his decease, were, by bill of revivor, made defendants ; wherein the title to the premises in question was decreed to the complainants in that suit. The defendants asked the court to instruct the jury, that the record of the proceedings and decree given in evidence by them, might be considered by the jury as conveying the title to the land in controversy in that suit, to the complainants therein, and would, and ought to affect parties and privies, who had knowledge of the same, to prevent their taking title from the defendant therein, from the time such knowledge existed. In place of this instruction, the court instructed the jury, that to prevent Buchanan from making a good deed to those lands, it was necessary he should have notice, actual or constructive, prior to the making such deed ; and of the commencement of the suit ; the service of the process or the order of publication, giving such notice to appear and answer ; and such publication made, to be proved : if the jury should find the deed from Buchanan to Sterling, was dated June 27th, 1825, and was at that time delivered, and the order of the court for the publication not made until August following, as appeared in the record aforesaid, it was competent for Buchanan to make such deed to Sterling ; and the court declared their opinion accordingly. The defendant prosecuted this writ of error.

The case was argued by *Mason*, for the plaintiffs in error ; and by *Corwin*, with whom was *Bond*, for the defendant.

The counsel for the plaintiffs in error, Mr. *Mason*, assigned the following reasons for the reversal of the judgment of the circuit court : 1. That on the trial of the cause, the court admitted as evidence in the cause, a paper purporting to be a deed from, or signed by, David Carrick Buchanan, to Walter Sterling, as appears by bill of exceptions ; which, for the reasons stated in the bill of exceptions, should not have been admitted in evidence. 2. There was also error in this, that the court, on the trial aforesaid, admitted in evidence to the jury a copy of another paper, *purport- ing to be a deed from Walter Sterling to Walter Dunn ; which, for [325 the reasons stated in the bill of exceptions, ought not to have been admitted in evidence. 3. There was also error in this, that the court refused to admit a certified copy of a deed from William Middleton, auditor of Brown county, to John S. Wills, for 200 acres of land, for the reasons stated in said bill of exceptions ; whereas, the same evidence ought to have been admitted. 4. There was also error in this, that said court refused to admit the same deed or copy, accompanied by a duly certified copy of the record of the proceedings, at and before the sale of said lands for taxes, for the reasons stated in the bill of exceptions ; whereas, said evidence ought to have been admitted.

Corwin, for the defendants, contended : 1. That the proceedings of the court in Virginia were not necessary to the validity of the deed ; that a good consideration was stated in the deed, independently of that decree ; that the title being in Buchanan, he had a right to convey, with or without the authority of the decree. 2. That it was not necessary, that the acknowledgment should aver or recite the delivery of the deed ; that possession of the deed was evidence to go to the jury of its delivery ; that the recital of delivery in the deed, was evidence of that fact. 3. That the recital in the deed, showing that the grantor, David Carrick Buchanan, Esq., was the same person formerly called David Buchanan, Esq., was evidence to go to the jury of the identity of the person named in the deed and patent. The counsel for the defendant also insisted, that it was incumbent on the party offering evidence of title growing out of a sale for non-payment of taxes, to show that the law was in all material respects complied with under which the auditor acted ; that neither the deed nor the record of the auditor showed such compliance. (See 18 Ohio Laws 70.) 4. That the defendants below claiming title under Brooke, through whom the lessor of plaintiff also claimed, it was not competent for them to dispute the validity of their common title. 5. That the identity of the land in question with that described in the title papers, was shown by the descriptive calls recited in the declaration, and those in the title papers of the plaintiff below, and was admitted by the consent rule.

The defendant below asked the court to charge the jury, that the statement in the deed from Buchanan to Sterling, reciting that David Carrick Buchanan, Esq., was formerly called David Buchanan, Esq., was no evidence that it was the same person who received the patent, and conveyed to Sterling. The court refused so to charge, and instructed the jury, that they must be satisfied from the deed, other documents, and the circumstances of the case, that David Carrick Buchanan, and David Buchanan, *326] were the same person ; *and declared their opinion, that such was the case ; to which opinions the defendants excepted. 1. The defendant in error insisted, that this exception only questioned the propriety of the opinion given to the jury as to the fact of identity, as arising out of the proof before them. 2. That it was proper for the court to give such opinion, leaving the jury to decide on it for themselves. 1 Pet. 182, 190 ; 10 Ibid. 80. 3. That the recital in the deed was evidence to be considered by the jury, with other proofs in the cause, to show the identity of the grantee of the United States with the grantor to Sterling.

McLEAN, Justice, delivered the opinion of the court.—This case is brought before this court from the circuit court of Ohio, by a writ of error. An action of ejectment was brought by Dunn against the defendants, in the circuit court, for the recovery of a certain tract of land ; and on the trial, exceptions were taken to the rulings of the court, which bring the points decided before this court.

The first objection taken was, that the deed offered in evidence by the plaintiff from David Carrick Buchanan to Walter Sterling, recited the proceedings and decree of a court of the United States for the fifth circuit and Virginia district, &c., and no exemplification of the record of such proceedings and decree was offered in evidence, in support of the deed. Buchanan

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was the patentee of the land ; and although he made the conveyance in pursuance of the decree, yet as the fee was in lim, the decree could add nothing to the validity of the conveyance ; and it was, therefore, wholly unnecessary to prove it. The deed was good, without the decree, and was only referred to by the grantor to show the consideration, in part, for making it.

The defendant also objected to the admission of the deed in evidence, because "it was not duly acknowledged and proved, according to law ; there being no proof of the delivery, either in the acknowledgment or other proof ; except what appears on the deed, and that it was in possession of the lessor of the plaintiff." This deed was executed at Glasgow, in Scotland, and its execution was proved by the two subscribing witnesses, who swore, "that they saw the said grantor seal and as his own proper act and deed, in due form of law, acknowledge and deliver this present conveyance." This oath was administered by the Lord Provost and chief magistrate of Glasgow, and which he duly certified, under his seal of office. The objection did not go to the execution of the deed, but to the want of proof of the delivery. In the conclusion of the deed, it is stated to have been signed, sealed and delivered in presence of the subscribing witnesses, and they swear that it was delivered. But independently of these *facts, the possession of the deed by the lessor of the plaintiff, who offers it in [*327 proof, is *prima facie* evidence of its delivery. Under ordinary circumstances, no other evidence of the delivery of a deed, than the possession of it by the person claiming under it, is required.

The defendant also objected to this deed, that it did not appear that the grantor, David Carrick Buchanan, was the same person named as grantee in the patent, who is called David Buchanan. In the deed, the grantor declares, that "I, David Carrick Buchanan, formerly David Buchanan," &c. And in connection with this objection, the court were asked to charge the jury, "that it is necessary for the plaintiff to convince them by proofs in court, that David Carrick Buchanan is the same person as David Buchanan, named as grantee in the patent ; that his statement of the fact in the deed is no proof tending to establish that fact." The court instructed the jury that they must be satisfied from the evidence given to them, to wit, by the deed and other documents in evidence, and the circumstances of the case, that the grantor in the deed to Sterling is the same person to whom the patent was issued ; and they declared their opinions that such was the fact. The principle is well established, that a court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of opinion in regard to the facts. When a matter of law is given by the court to the jury, it should be considered as conclusive ; but a mere matter of opinion as to the facts, will only have such influence on the jury as they may think it is entitled to. The law knows of but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial ; and it is competent for the party to show that he is known as well without as with the middle name. 5 Johns. 84 ; 12 Pet. 456. We think there was no error in the circuit court, either in admitting the deed, or in their instruction to the jury on the point stated.

A deed from Sterling to Walter Dunn, the lessor of the plaintiff, for the premises in controversy, was objected to, on the ground, "that the delivery

thereof was not proved nor acknowledged, in the acknowledgment and proof thereof thereon indorsed." This deed is not in the record, and it cannot, therefore, be inspected ; nor can it, indeed, be considered in reference to the objection. But the same question is raised, it seems, on this deed as was made on the deed from Buchanan to Sterling, and the remarks of the court on that exception would be equally applicable to this, if the deed to Dunn were in the record.

The evidence of the lessor of the plaintiff being closed, the defendants offered in evidence a certified copy of a paper purporting to be a deed from the auditor of Brown county to John S. Wills, dated *the 22d April *328] 1824, for two hundred acres of land in the tract claimed by the lessor of the plaintiff ; which the court overruled, on the ground that it could not be received, without proof that the requisites of the law, which subjected the land to taxation and sale, had been complied with. The defendants then offered the same deed, or copy of a deed, accompanied by a duly certified copy of the record of the proceedings, at and before the sale of said land, for taxes, dated 9th May 1838, certified by Hezekiah Lindsey, county auditor of said county of Brown, which the court overruled.

The laws of Ohio, imposing a tax on lands, and regulating its collection, like similar laws in, perhaps, almost all the other states, are peculiar in their provisions, having been framed under the influence of a local policy. And this policy has, to some extent, influenced the construction of those laws. There can be no class of laws more strictly local in their character, and which more directly concern real property, than these. They not only constitute a rule of property, but their construction by the courts of the state should be followed by the courts of the United States, with equal, if not greater, strictness than the construction of any other class of laws.

It will be found from the Ohio reports, that the supreme court has required a claimant under a tax title to show, before his title can be available, a substantial compliance with the requisites of the law. In 2 Ohio 233, the court say, " the requisitions of the law are substantial and useful, and cannot be dispensed with ; tax sales are attended with greater sacrifice to the owners of land than any others ; purchasers at those sales seem to have but little conscience ; they calculate on obtaining acres for cents ; and it stands them in hand to see that the proceedings have been strictly regular." In the case of the *Lessee of Holt's Heirs v. Hemphill's Heirs*, 3 Ohio 232, the court decided, that a deed from a collector of taxes is not available to transfer the title, without proof that the land was listed, taxed and advertised," &c.

The act of the 2d February 1821, provides, that " all deeds of land sold for taxes, shall convey to the purchaser all the right, title and interest of the former proprietor, in and to the land so sold ; and shall be received in all courts as good and sufficient evidence of title in such purchaser." Under this and similar provisions, which are found in the various tax laws, up to 1824, the courts of Ohio seem never to have held, that the deed on a tax sale is admissible as evidence of title, unaccompanied by proof that the substantial requisites of the law, in the previous steps, had been complied with. The collector, or person making the sale, was considered as acting under a special authority, and that his acts must be strictly conformable to law, to divest the title of real property, without the consent of the owner. And

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the purchaser at such sales is held bound to see that the requirements *of the law, which subjected the land to sale for taxes, had been strictly observed. These principles have been repeatedly sanctioned [*329 by this court.

We will now examine the statutes under which the sale in question was made, with the view of ascertaining whether the circuit court erred in overruling the record of the auditor, offered in evidence to support the tax deed. The act of the 8th February 1820, and the act to amend the same, of the 2d February 1821, are the laws under which the title in question was obtained. The county auditor is required to make out from the books or lists in his office, every year, a complete duplicate of all the lands listed in his office, subject to taxation, with the taxes charged thereon. In which duplicate, he shall state the proprietor's name, the number of entry, for whom originally entered, the quantity of land contained in the original entry, the county, water-course, number of acres, whether first, second or third rate land, and the amount of taxes charged thereon. These matters of description are required to be entered in separate columns, opposite the name of the proprietor. And the auditor is required to keep a book for that purpose, and to record in the form above specified, the land entered in his county for taxation. If the tax be not paid in the county, by the 20th November, or to the state treasurer, by the 31st December, in each year, the lands are to remain charged with all arrearages of taxes, and the lawful interest thereon, until the same shall be paid ; to which there shall be added a penalty of twenty-five per cent. on the amount of tax charged, for each year the same may have been delinquent. The auditor of the state is required to compare the list of defalcations transmitted from each county auditor with the duplicates sent to his office from said county, for the same year ; and to record in a book kept for that purpose, the delinquent lands, and charge the same with penalties and interest. And the county auditor is required, in making out the duplicate for his county, to charge each tract, in addition to the tax for the current year, with the tax, interest and penalty of the preceding year, which shall be entered in a separate column, to be designated for that purpose on said duplicate. And when lands are returned delinquent for two years, the penalty and interest are to be charged for each year by the state auditor, who is required to transmit the same to the county auditor ; and he is forbidden to enter lands a second time delinquent on the duplicate for the current year. On receiving this list of lands a second time delinquent, the auditor is required to advertise the same, six weeks successively, in a newspaper printed in the county, which advertisement shall state the amount of the tax, interest and penalties due on each tract, and the time of sale, &c. All sales are to be made by the county auditor ; and on such sale being made, he is required "to make a fair *entry, descriptive thereof, in a book to be provided by him for that purpose," and shall also "record in said book, all the proceedings [*330 relative to the advertising, selling and conveying said delinquent lands ; which record shall be good evidence in all courts holden within this state."

The record offered in evidence is stated to be a "record of the proceedings relative to the advertising, selling and conveying the lands delinquent for tax, for the years 1821, 1822 and 1823, within the county of Brown, and state of Ohio"

"Be it remembered, that the following lands, as herein set forth, advertised for sale, in the names of the person to each tract annexed, were regularly entered on the duplicates for taxation, by the auditor of Brown county, for the year 1821; the tax whereon not being paid for said year, the collector of said county returned the same as delinquent therefor; whereupon the said county auditor made out and transmitted to the auditor of state, a list of said lands so returned as delinquent; and afterwards, a list of said lands, with the amount of taxes, penalty and interest charged thereon, was transmitted by the auditor of state to the county auditor of said county; whereupon, a copy thereof was published three weeks in succession in a newspaper printed at Georgetown, Brown county, Ohio, in general circulation in said county; and afterwards, the county auditor, in making out the duplicate for said county the succeeding year, to wit, for the year 1822, charged each tract in addition to the tax for said year 1822, with the tax, interest and penalty of the proceeding, and sent the same out a second time for collection; the tax on said land not being paid for the year 1822, they were a second time returned delinquent for the non-payment of the tax, penalty and interest charged thereon; a list of which was again transmitted to the auditor of the state; that afterwards, the said auditor of the state did transmit," &c. This, together with the advertisement published six months before the sale of the land, is the record and only evidence offered to show that the legal requisites of the law had been complied with, previous to the sale of the land.

The first objection which arises to this paper is, that it is a mere historical statement of the facts as they occurred, and not a copy from the record. The first important step is to show that the land was listed for taxation. On this depends the validity of the subsequent proceedings. And how is this shown by this record? It states, that "the land was regularly entered on the duplicates for taxation, and sent out for collection for the year 1821," &c. Now, this is a mere statement of the fact, and not an exemplification of the record. The record of the auditor shows in what manner the land was listed for taxation, the amount of tax charged, the description of the land required by the law, and the rate at which it was entered. But the *331] auditor, in the record before us, has stated that the entry or list *was regularly made, without copying the same from his records, which copy would enable the court to determine whether the entry for taxation had been made legally. Now, this is the foundation of the whole proceeding; and unless the court will substitute the judgment of the auditor for their own, it is impossible for them to say, the land was entered for taxation according to law.

Suppose, the auditor had, instead of copying the advertisement on which the land was sold, merely stated that the land had been regularly advertised; could such a statement have been held sufficient? Perhaps, no one acquainted with the legal requisites on this point, could hesitate in deciding that such a statement would be radically defective. That the advertisement constituted an essential part of the record, as the court could only judge of its sufficiency by inspecting it. It would not do, therefore, for the auditor to withhold from his record and the court, the advertisement, and merely say that it was regular.

Clear as this point is, it is not less so, than the objection above stated.

The listing of the land in conformity to law, is as essential as advertising it for sale. But in this record we have no evidence that the land was entered according to law, except the mere statement of the fact by the auditor, that it was so entered. Is this statement evidence? The law makes the record evidence; but this statement is evidently made out, not by copying from the record, but by looking at the record, and giving in a short statement what the auditor supposed to be the fact. Suppose, it should be important, in any other case, to show that this land had been regularly entered for taxation in the year 1821. Would the certificate of the auditor, in general terms, that the land was regularly entered that year, be evidence? Must not the record itself be produced, or an exemplification of it; which would show how it had been entered; and enable the court to judge of the regularity of the entry? That this would be required, seems too clear for argument; and yet, in no possible case, could this evidence be so important, as in the case under consideration.

If the court are to receive the mere statement of the auditor, that the land was regularly entered, which is the first step in the proceeding, and as important as any other; to be consistent, they must receive his mere statement, as proof that the subsequent steps were taken as to the charge of penalties, and interests, and delinquencies, and that it was advertised regularly and sold. This would be a short mode of arriving at the result, and might add somewhat to the validity of the titles, in disregard, however, of the rights of the non-resident land-holder. The law requires the auditor, on receiving the list of delinquent lands from the state auditor, to give public notice, by advertisement, for three weeks in succession, in some newspaper in general circulation in his county, of the amount of taxes charged, &c. Now, if this advertisement be not published, the land cannot be returned by the auditor a second time as delinquent; and if not regularly returned *as delinquent, twice, it is not liable to be sold. And what evidence [*332 is there in the record, that this notice was given. There is none, but the mere statement of the fact that such notice was given three weeks in succession, in a newspaper printed in Georgetown. Now, if the statement of the auditor be sufficient as to this notice, it must be held equally good as to the notice of the sale. This land was transmitted from the auditor of the state twice, charged with penalties, to the county auditor, who, by the 36th section of the act of 1820, was required to publish the same, when received, three weeks; but it seems from his record, that this notice has been but once given.

And again, there is no evidence that the penalties were charged, and the interest added, but the mere statement of the auditor. What amount was charged as penalty, and the amount of interest added, nowhere appears.

In the list published in the notice of sale, it does not appear at what rate the land was entered for taxation; and the gross sum of \$50 is charged, without showing of what items it was composed. In the case of *Lafferty's Lessee v. Byers*, 5 Ohio 458, the plaintiff offered in evidence an exemplified copy of the books of the county auditor, showing the listing for taxation, and the advertisement of the sale.

Upon the whole, we think that the court did not err, in rejecting the paper certified by the auditor as a record. We think that this record con-

tained no evidence that the land was regularly listed for taxation ; and that it was defective, in not showing that other important requisites of the law had been complied with. That it is a mere historical account of the facts as they transpired, and not the record evidence of those facts, as they appear or should appear on the record. Under the law of 1824, which makes the tax deed *prima facie* evidence, the Ohio courts have not required proof to the same extent in support of the deed, as before such law. But the present case does not come under this law ; and it is unnecessary to go into its construction by the Ohio courts. 5 Ohio 370.

The defendants gave in evidence a duly authorized transcript of the record, proceedings and decree of the supreme court of the state of Ohio, of a certain case, wherein White's heirs and J. S. Wills's heirs, and H. Brush, were complainants, and David Buchanan, deceased, in his lifetime, defendant ; and his unknown heirs defendants, after his death, by bill of revivor ; wherein the title to the premises in question, and other lands, were decreed to complainants. And here the defendants rested their case.

The court were asked to instruct the jury, by the defendant, that it was necessary for the plaintiff to prove the calls of his patent for the ground, by establishing the different corners, &c. But the court refused to give the instruction as requested, and informed the jury, that, by a rule of court, the defendants having entered into the consent rule, were bound to admit, at *333] the trial, that they are in possession *of the premises claimed by the lessor of the plaintiff. And there can be no doubt that, under the rule, this decision of the court was correct. This was not a dispute about boundaries, but of title ; and in such a case, the rule referred to is salutary, and supersedes the necessity of proving the possession of the defendant. Without this rule, it would have been incumbent on the plaintiff to prove the possession ; but this could have been done by any one who had a general knowledge of the land in controversy, and who could state that the defendant was in possession.

And the court instructed the jury, that the pendency of the suit against Buchanan and his heirs, could in no sense be held constructive notice to Sterling, in receiving the deed from Buchanan, after the commencement of the suit, unless the process had been served, or publication made, before such deed was executed. There can be no doubt, that this instruction was proper ; and upon the whole, we affirm the judgment of the circuit court.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*UNITED STATES, Appellants, v. ELIZABETH WIGGINS, Appellee.

Florida land-claims.—Spanish treaty.

A grant of land, by Estrada, the governor of East Florida, was made, on the 1st of August 1815 to Elizabeth Wiggins, on her petition, stating, that "owing to the diminution of trade, she will have to devote herself to the pursuits of the country;" the grant was made for the quantity of land apportioned, by the regulations of East Florida, to the number of the family of the grantee; it was regularly surveyed by the surveyor-general, according to the petition and grant; no settlement or improvement was ever made by the grantee, nor by any one acting for her, on the property. In 1831, Elizabeth Wiggins presented a petition to the superior court of East Florida, praying for a confirmation of the grant; and in July 1838, the court made a decree in favor of the claimant. On an appeal to the supreme court of the United States, the decree of the superior court of East Florida was reversed; the court held, that by the regulations established on the 25th November 1818, by Governor Coppinger, the grant had become void, because of the non-improvement, and the neglect to settle the land granted.

The existence of a foreign law, especially, when unwritten, is a fact to be proved like any other by appropriate evidence.

A copy of a decree by the governor of East Florida, granting land to a petitioner, while Spain had possession of the territory, certified by the secretary of the government to have been faithfully made from the original in the secretary's office, is evidence in the courts of the United States. By the laws of Spain, prevailing in the province at that time, the secretary was the proper officer to give copies; and the law trusted him for this particular purpose, so far as he acted under its authority; the original was confined to the public office. *Owings v. Hull* 9 Pet. 624; *Percheman's Case*, 7 *Ibid.* 51; *United States v. Delespine*, 12 Pet. 655, cited.

Primâ facie evidence of a fact is such, as in judgment of law, is sufficient to establish the fact, and if not rebutted, remains sufficient evidence of it. *Kelly v. Jackson*, 6 Pet. 632, cited.

The eighth article of the Florida treaty stipulates, that "grants of land made by Spain, in Florida, after the 24th of January 1818, shall be ratified and confirmed to the persons in possession of the land, to the same extent that the same grants would be valid, if the government of the territory had remained under the dominion of Spain." The government of the United States may take advantage of the non-performance of the conditions prescribed by the law, relative to grants of land, if the treaty does not provide for the omission.

In the case of *Arredondo*, 6 Pet. 691, and *Percheman*, 7 *Ibid.* 51, it was held, that the words in the Florida treaty, "shall be ratified and confirmed," in reference to perfect titles, should be construed, "are" ratified and confirmed. The object of the court, in those cases, was, to exempt them from the operation of the eighth article, for that they were perfect titles by the laws of Spain, when the treaty was made; and that when the soil and sovereignty of Florida were ceded by the second article, private rights of property were, by implication, protected. By the law of nations, the rights to property are secured, when territories are ceded; and to reconcile the eighth article of the treaty with the law of nations, the Spanish side of the article was referred to, in aid of the American side. The court held, that perfect titles "stood confirmed" by the treaty; and must be so recognised by the United States, in our courts.

Perfect titles to lands, made by Spain, in the territory of Florida, before the 24th January 1818, are intrinsically valid, and exempt from the provision of the eighth article of the treaty; and they need no sanction from the legislative or judicial departments of the United States.

The eighth article of the Florida treaty was intended to apply to claims to land whose validity depended on the performance of conditions, in consideration of which the concessions had been made; and which must have been performed, before Spain was bound to perfect the titles. The United States were bound, after the cession of the country, to the same extent, that Spain had been bound, before the ratification of the treaty, to perfect them by legislation and adjudication.

*APPEAL from the Superior Court of East Florida. The appellee, Elizabeth Wiggins, on the 1st of August 1815, presented a petition to Estrada, the governor of East Florida, stating, that "owing to the diminution of trade, she will have to devote herself to the pursuits of the country;" and wishing to establish herself on the eastern side of the Pond,

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of St. George, "she asked the governor to grant three hundred acres in the said place, as she had five children, and five slaves, with herself." By a decree of the 6th of August 1815, the object of the petition was granted by Governor Estrada, and "a certified copy of this instance and decree," was ordered to be issued to the petitioner, "from the secretary's office." A certified copy of these documents was given to the petitioner, on the same day, by "Don Tomas de Aguilar." A survey of the land was made by the surveyor-general of the province, on the 23d of March 1821. On the 26th of May 1831, Elizabeth Wiggins presented a petition to the judge of the superior court of East Florida, stating her claim to three hundred acres of land, granted to her by Governor Estrada, and praying that the validity of the claim might be inquired into, and decided by the court, in pursuance of the acts of congress.

The answer of the district-attorney of the United States to this petition, denied the right of Elizabeth Wiggins to the land claimed on many grounds. Those which were brought into examination, and decided upon, were : 1st. That the petitioner had never taken possession of or cultivated the land. 2d. The petitioner was required to make proof that a grant for the land had been issued. 3d. That the petitioner having failed and neglected to occupy, improve or cultivate the land, and having abandoned it, the right and title thereto, if any had existed, were wholly forfeited and lost.

Subsequently, a replication to the answer of the United States was filed, and the original certified copy of the grant to Elizabeth Wiggins of the land, the same being certified by Tomas de Aguilar, secretary, &c., was offered in evidence by the claimant, and was objected to by the United States. The court admitted the evidence.

By an amended bill, the petitioner also stated, that no condition of settlement or improvement was contained in the grant of the land ; and that if any condition of settlement had been contained in it, the unprotected situation of that part of East Florida, from Indian depredations and aggressions, from the time of the grant to the cession of the territory of Florida to the United States, had rendered it impossible to settle in that portion of the country, with safety to the persons or property of those who might venture so to do.

The United States in an amended answer, set up, in further opposition *336] to the claim of the petitioner, the usage, practice and custom *of the government of Spain, which prevailed when the alleged grant was made ; that ten years' occupancy and cultivation of the land, under such a grant, was necessary to give the grantee the title in fee-simple to the land. The United States stated other objections to the title claimed by the petitioner ; and denied, that the settlement of the land was rendered dangerous by the disturbed state of the country.

The parties to the cause proceeded to take evidence in support and in opposition to the claim of the petitioner ; and the cause was heard on the documents and evidence. At July term 1838, the superior court made a decree, confirming the title of Elizabeth Wiggins to the land claimed by her : from this decree, the United States took an appeal to this court.

The case was argued by *Gilpin*, Attorney-General, and *Dent*, for the United States ; and by *Downing*, for the appellee.

Gilpin, for the United States.—This is one of the numerous class of cases which has of late years repeatedly claimed the consideration of this court. The rule laid down by the late chief justice is one that should be recognised whenever they are discussed : that “it would violate the usage of nations, and outrage the sense of justice, to annul private rights.” To protect these is the duty of this court ; and it was also unquestionably the desire and object of the executive government, when it made the treaty with Spain. The eighth article of that treaty was adopted, after much discussion and change ; and these discussions turned mainly on the provisions which were to guard private and existing interests. But, on the other hand, fraud is to be prevented ; the public domain, of which the acquisition was costly, is to be protected ; opportunities of deception, growing out of the change of dominion, are to be watched ; titles are to be saved from embarrassment and conflict ; and the regulations made imperative on the land-holder, by the Spanish laws, are not to be wantonly relaxed. The Spanish land law in Florida was one of great liberality ; occupation and cultivation formed the only price which the government required from its grantees ; but this price it did absolutely require. While, therefore, we sacredly uphold every vested right, and reserve to every citizen of Florida the privileges he derived under the Spanish law, we must exact of him proof of a compliance with the conditions that law imposed, before we allow him the benefit of its privileges. We have no right to tolerate what would facilitate or sanction fraud or unjustifiable negligence.

The Spanish government would not, in its most liberal spirit, have confirmed to the present claimant the grant of land she now seeks to obtain. Her claim is founded on a concession of three hundred acres, alleged to have been given by Governor Estrada, in 1815, and to have been surveyed in 1821 ; but never, as is admitted, possessed or cultivated to this day. Two inquiries, therefore, present *themselves : first, whether such a [*337 concession was ever made, in point of fact ; and secondly, whether, if it was not, the acts of the claimant since have been such as now to authorize its confirmation.

I. That no such concession was ever granted by Governor Estrada may be inferred, from the fact that none was ever produced or exhibited, until the year 1833, eighteen years after it purports to have been made. The claim itself first appears in the report of the register and receiver, dated in January 1827, twelve years after the alleged grant. Even then, it is sustained only by an alleged certificate of survey, dated on the 23d March 1821, purporting to have been made by the surveyor-general, Clarke, six years after the grant, in face of the Spanish law, which required the possession to be taken within six months after the date of the grant. There was no evidence of occupation or cultivation ; none of the existence of the concession now relied on ; its existence was not even alleged, till the year 1833 ; the claim, up to that time, was admitted to rest on the certificate of survey by Clarke, which, if genuine, was made by him in direct violation of the Spanish land law.

But, independent of the strong inferences resulting from these circumstances, the documentary title now set up is inadmissible as legal evidence. No original paper is exhibited ; of the concession, we have merely a copy, certified by Aguilar, the governor’s secretary ; of the certificate of survey,

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we have merely a copy, certified by the keeper of the public archives. No evidence is offered, to show that either of these papers ever existed. Aguilar, the person who copied the concession, is not produced; Clarke, the surveyor-general, who is examined, does not prove either the concession or his own certificate of the survey; Alvarez, a clerk in Aguilar's office, at the time, never saw or heard of the original concession; Cavedo, a clerk in the record office, knows nothing of it; no evidence of its existence, and consequently, of its loss or destruction, appears throughout the record.

To supply the want of this, the claimant attempts to establish a presumption of loss, by alleging that the documents in the record office were so carelessly kept, as to make the loss of these papers very probable. But this allegation is quite inconsistent with the testimony before this court. The papers are shown, at all events, to have been carefully kept from 1815 to 1821; yet Alvarez, who kept them, and constantly examined them, never saw such a concession; in 1821, the return of the survey must have led him to recur to it, if in existence; the surveyor-general, who was well acquainted with the office papers, never saw it; in a list of documents made soon after the change of flags, neither the concession nor certificate of survey is alluded to. These circumstances, taken in connection with the fact, that the concession was never relied on by the claimant, till 1833, are inconsistent with the presumption of existence and loss. Nor is this all: there is evidence which goes far to raise a contrary presumption; the loss of no grant from these archives has been alleged, except such as now depend on copies *338] certified by *Aguilar; and evidence was offered to prove, that in two cases, at least, he had proposed to forge, or did actually forge, documents of a similar character; although this evidence, being objected to by the claimant, was, no doubt, properly rejected, yet it forms a strong circumstance, taken in connection with the rest, to authorize a presumption that there never was any original concession.

Admitting, however, the facts on which the claimant presumes this loss, yet they can have no weight, as legal evidence, without previous proof, that the document in question did actually exist. Satisfactory testimony that the original existed, is absolutely necessary, before the certified copy can be admitted. In the case of *Goodier v. Lake*, 1 Atk. 446, Lord HARDWICKE required, not merely that the existence, but the genuineness, of a note, alleged to be lost, should be shown, before a copy was admitted; and in that of *Irwin v. Simpson*, 7 Bro. P. C. 317, an office copy of a bill was rejected, though an officer of the court was ready to prove that the original could not be found, after a search among the records. In the case of *Caufman v. Congregation of Cedar Springs*, 6 Binn. 63, the supreme court of Pennsylvania held, that, in order to prove the substance of a written agreement, evidence of its existence must be first given, and then that it was lost or destroyed. So, in the case of *Meyer v. Barker*, Ibid. 237, the same court say, that before secondary evidence of the contents of a written instrument can be given, "there must be proof that such instrument once existed, and is lost or destroyed." This rule has been repeatedly recognised by other judicial tribunals; *Jackson v. Todd*, 3 Johns. 304; *Spencer v. Spencer*, 1 Gallis. 624; and in this court, distinct proof that a lost deed had been in possession of a person to whom it properly belonged, was regarded as a necessary ground for the admission of secondary evidence of its contents.

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Minor v. Tillotson, 7 Pet. 101. The present claimant offers no direct testimony whatever of the existence of her concession. The only evidence, in fact, is, that a copy of it is referred to in the certificate of survey; but even of that certificate of survey, nothing but a copy is produced. Clearly, the case is not brought within the well-established rule.

It is contended, however, that the rule in question does not apply, where the originals are placed in a public office, and the office is allowed by law to give to the parties certified copies. To this it is answered, in the first place, that this exception does not, in any case, dispense with direct proof of the original having existed; but in the second place, it is never applicable in a case where the genuineness of the original is contested. In the case of the *United States v. Percheman*, 7 Pet. 84, where the question arose in regard to the admission of these certificates, it was declared by the court, in admitting them, that the original must be produced, if either party should suggest the necessity of so doing. In the case of *Minor v. Tillotson*, *Ibid.* 101, it was held, that wherever suspicion hung over the instrument, the copy was not to be admitted, without rigid inquiry. In the case of the *United States v. Jones*, 8 *Ibid.* 382, it was held, that although a certified [*339] treasury transcript of documents filed in the public offices, is made, by law, of equal validity with the originals, yet the defendant is at liberty to impeach the evidence thus certified, and, on allegation of fraud, require the production of the original. In the case of *Owings v. Hull*, 9 *Ibid.* 626, where the copy of a bill of sale in Louisiana was admitted, it was done upon the express ground, that the original was in the possession of the notary. In the case of *Winn v. Patterson*, *Ibid.* 675, it was held, that there must be satisfactory proof of the genuineness and due execution of a power of attorney, before a copy from the public office of the recorder could be received. In the case of the *United States v. Desespine*, 12 *Ibid.* 656, the extent to which these certificates of Florida concessions were to be admitted, as evidence, was discussed; and their admission was made to depend upon the fact that there was positive proof of the existence of the original concession, in the office of the secretary who gave the certificate. This case, therefore, is not excepted from the common-law rule, making proof of the existence of the original necessary, by the fact that its deposit in a public office was required.

It is however contended, that by the usages recognised in the Spanish law, the certificate is evidence, without proving the existence of the original. No authority has been cited on this point; no law, order, receipt or judicial decision to that effect, has been exhibited. The claimant relies on the parol evidence of a few persons in Florida, to prove, what, if it exists, must be a well-settled rule in the judicial tribunals of Spain. This is not a matter of mere local usage, which is to be established like an ordinary fact. But taking the parol testimony in the record, it will be found, that in every instance where the witnesses speak of a certified copy of a concession being of equal validity with the original, they explain themselves as referring to cases where the original is known or proved to exist. Alvarez, the principal witness of the claimant on this point, says, that "he does not recollect a certified copy of a grant being received in evidence in a Spanish court of justice, where the original was not on file in the proper office; and from his knowledge of the practice of the government, he does not believe that such a copy would be received in evidence in a Spanish court, unless the party

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could prove that the original was in the office, at the time the copy was made." On these grounds, it is submitted, that there is no evidence of this concession ever having been made; but a strong presumption against it.

II. If, however, the original concession is proved, still the claimant is not entitled to a confirmation of it, because she performed none of the conditions which were required to perfect her title, by the Spanish law. Grants *340] of land in Florida, by the Spanish authorities, so far as *they have come before this court, appear to have been of three classes.

1st. Absolute grants, in consideration of services already performed, which were made by the governors, in special cases, either by virtue of a special power recognised by the laws of the Indies (2 White's New Recopilacion, 38, 40, 52), or by the authority given, in particular decrees, coming directly or indirectly from the sovereign, as in the case of the grants conferred upon Salus, Paulin and Percheman, in reward for their services. 2 Ibid. 280. The very nature of these grants forbids a limitation on the quantity, or on the consideration that might move them. They are recognised by this court in the cases of the *United States v. Percheman*, 7 Pet. 97; and *United States v. Clarke*, 8 Ibid. 455.

2d. Grants in consideration of services to be performed, and deemed specially important for the improvement of the province. These do not seem to have grown out of any law or royal order, but were not infrequent, for some years before the cession of Florida. They were established by usage, and recognised as lawful. 2 White's New Recopilacion, 386, 289-90. The services appear to have been of three kinds: the erection of saw mills, factories or mechanical works; the introduction and rearing of large numbers of cattle; and the establishment, in particular places, of large bodies of settlers. The titles to these were, in some instances, absolute on their face, and conveyed a present grant, from their date, though coupled with conditions for the subsequent performance of the specified services; or they were mere concessions or incipient grants, securing a future absolute title, on the performance of the conditions. The first are recognised by this court, in the cases of *United States v. Arredondo*, 6 Pet. 745-6; *United States v. Clarke*, 8 Ibid. 441, 467; *United States v. Sibbald*, 10 Ibid. 313, and others. The second, in the cases of *United States v. Mills*, 12 Pet. 215, and *United States v. Kingsley*, 12 Ibid. 477, 486.

3d. But the great class of cases was that of gratuitous grants, in moderate quantities, for purposes of actual occupation and cultivation. To this class is applicable the general system of Spanish land-law which existed in Florida and Louisiana; and the regulations embraced under it are as clear and distinct as those of the land-laws of the United States. It is true, the grants were gratuitous, but the performance of the conditions annexed by that law, was a consideration as explicit as the payment required by our laws.

The regulations in regard to these grants are first found in the Compilation of the Laws of the Indies, promulgated by the Spanish sovereign in 1682. By those laws, grants were distributed by the governors to settlers, on condition that they should take actual possession of the land granted, in three months, and build upon and cultivate them; and after four years of such occupation, they were entitled to hold the land in absolute property. 2 White's New Rec. 48, 50, 51. The incipient grant, termed a concession,

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was deposited *in the office of the governor's secretary ; but, on proof of the necessary occupation and cultivation, the settler received an absolute grant, or, as it was called, a royal title, which was recorded in the office of the *escribano*, or notary of the province. Ibid. 283. The quantity to be given to each settler is not prescribed in the laws of the Indies, but the governors are directed to graduate it. These regulations are subsequently recognised by the king of Spain, in his royal orders of 1735, 1754 and 1768 (Ibid. 62, 64, 71 ; and in the latter, it is declared, that "where any shall not apply themselves in a proper manner to improve the lands allotted to them, the same shall be taken from them (which I do without mercy), and granted to others who shall fulfil the conditions." In 1770, O'Reilly, the governor of Louisiana, promulgated his regulations, fixing two hundred and forty arpens as the quantity of a concession for a family, and allowing an absolute title, in the name of the king, after three years cultivation and improvement, to be ascertained after strict inquiry. Ibid. 229-30. In 1790, under the administration of Governor Quesada, in East Florida, and pursuant to a royal order, dated the 29th November 1789, we have the quantity allotted to the settlers in that province specifically designated ; one hundred acres are assigned to each head of a family, and fifty to each other person composing it, whether white or black ; provision is also made, that foreign emigrants shall first take an oath of allegiance to Spain ; the surveyor-general is required to inform the settlers that they will obtain their concessions or incipient titles from the governor's secretary ; and also, to give them express notice that the conditions prescribed by law must be completed, before they can receive an absolute title. Ibid. 276 ; 1 Clarke's Land Laws, 996-8. In 1797, Governor Gayoso, in Louisiana, enlarged the allotment to two hundred acres for the head of the family, fifty acres for each child, and twenty for each negro ; he required possession to be taken within one year, and gave an absolute title, after three years' cultivation. 2 White's New Rec. 233. In 1799, Governor Morales declared, explicitly, that notwithstanding the concession, or first grant, by which the settler obtained possession, he was "not to be regarded as the owner of the land, until his royal title was delivered complete." Ibid. 239. In 1803, Governor White, in East Florida, reduced the allotment to fifty acres for the head of the family, twenty-five acres to each child and slave above the age of sixteen years, and fifteen acres to each that was younger ; he declared, that "every concession, in which no time was specified, should be null, if possession and cultivation were not commenced within six months." He also required ten years' possession, before an absolute or royal title was granted ; and decreed, that if, in any case, the land was abandoned for two years, the title should be absolutely void. Ibid. 259, 277-8, 281. In 1811, Governor Estrada solicited permission to change these regulations, and to be allowed to sell the lands absolutely for money, in lieu of granting them gratuitously *on [*342 conditions of cultivation and settlement ; but all change in the system was explicitly refused. Ibid. 266-7. In 1813, the Cortes, under the new Spanish constitution, passed an ordinance authorizing such sales, but this was repealed the next year, and the previous laws and regulations were restored. Clarke's Land Laws, 1007, 1010 ; 8 Pet. 455. With this partial exception (which does not appear to have been acted on in practice), the regulations of Governor White continued in full force till 1815, when

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Governor Kindelan, on account of the Indian disturbance, relaxed them so far as to grant absolute titles to settlers, who had actually built houses and improved their lands, though the ten years' settlement was not complete. 2 White's New Rec. 288. In 1818, Governor Coppinger, at the instance of Garrido, an agent of the Duke of Alagon, directed a full investigation and review of the land system of Florida to be made; and the report of Saavedra, which was sanctioned by the governor, fully establishes the regulations which have been cited, as then in existence; whether they relate to the absolute grants, the grants upon express condition, or the gratuitous concessions for purposes of settlement and cultivation. Ibid. 282, 288.

The claimant's title in this case rests on a concession of Governor Estrada, of three hundred acres; not asked or granted for any services, but because "she has five children and five slaves, with herself." This entitled her to three hundred acres. At that time, the regulations of Governor White were in full force. She never occupied the land nor cultivated it, at any time from the date of the concession to the present day. It cannot be doubted, but that under the Spanish law, "her concession is of no value or effect, the prescribed conditions not having been complied with, nor can she by means of it claim any right to the land granted, which should now be considered vacant." These are the words of Saavedra. 2 White's New Rec. 283.

But it is said, the eighth article of the treaty between Spain and the United States, ceding Florida, recognises this as a valid and existing title, because there is no condition expressed in it. The treaty declares, that "Spanish grants, made before the 24th January 1818, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of Spain." (S U. S. Stat. 258.) 2 White's New Rec. 210. The meaning of this article has been fully canvassed and settled by this court. In the case of the *United States v. Arredondo*, 6 Pet. 741, it was held, that under the treaty, and without the necessity of any further act by the United States, all complete and absolute titles then existing, "stood confirmed;" and this decision was repeated in the case of the *United States v. Percheman*, 7 Ibid. 89. But all grants which were not complete and absolute, could only be made valid by the legislation of the United States. The question, then, resolves itself into this: has any legislation, in pursuance of this *343] treaty, given validity to a concession or imperfect title, where the grantee had not performed the conditions required by the Spanish law, to make the grant valid? The first act, that of 8th May 1822 (3 U. S. Stat. 709), directs an examination by commissioners into the fact, whether the claim presented was valid, "agreeably to the laws and ordinances, previously existing, of the governments making the grant." The act of 3d March 1823 (Ibid. 754) recognises and directs the same inquiry. The act of 28th February 1824 (4 Ibid. 6) makes it incumbent on the claimant to establish, that "the conditions required by the laws and ordinances of the Spanish government," shall have been complied with. And the act of 23d May 1828 (Ibid. 284), which finally submits the claim to a judicial decision, restricts them by the rule prescribed in the act of the 26th May 1824 (Ibid. 47), to such as "might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government, under which

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the same originated." While, therefore, a complete and perfect grant is recognised as valid, without inquiring into the fact, how far it had been duly made ; it is apparent, that neither by the treaty, nor by the legislation of congress, is an inceptive or imperfect grant confirmed, unless it might have been perfected under the laws and usages of Spain. It has been shown, that the present claim could not have been so perfected, but that it was, and is, absolutely null ; and " the land granted should now be considered as vacant."

Nor can any decision of this court be shown, which goes to establish such a claim ; no case exactly similar has come before it ; but so far as the principles heretofore laid down are applicable to it, it is submitted, that they sustain the ground now taken, on behalf of the United States. If so, the decision of the court below was erroneous, and the claim of the appellee should be rejected ; even if it be admitted, that the proof of the existence of the original concession is sufficient.

Downing, for the appellee, contended :—1. That this copy is full and sufficient proof of the grant : 1st, by the Spanish laws and usages ; and 2d, by the common law of England, adopted in Florida, as primary evidence, before the Spanish court—as secondary and sufficient, before ours. 2. That the absence of the original from the archives, is accounted for by the carelessness with which the papers were kept ; and does not furnish a presumption that it never existed.

The appellee may safely rest her case on the authority of the cases decided by this court, as to the proof of the grant from Governor Estrada. A certified copy of the grant is presented, and this is the only paper a claimant of land in East Florida can have. The petition for the grant, and the order of the governor of Florida upon it, are office papers ; and always on file in the office of the secretary *of the government. Certified copies, which serve as titles, are issued by the government ; this was [*344 the practice in all such cases.

The question before the court is upon the validity of the certificate of title. As to the performance of the condition of settlement, it has been repeatedly held, by this court, it is a condition subsequent, and does not affect the validity of the grant. 10 Pet. 321. But in the grant to Elizabeth Wiggins, there is no condition of settlement. It has always been contended, in Florida, that even if there is a condition of settlement in the grant, the forfeiture is to be enforced by the government ; and until this is done, the grant is in full operation. No case is known, in which the forfeiture has been claimed. Grants of this description were made as inducements to settlements and improvements. The government required an agricultural population, to increase the safety of the whole community from Indian depredations. Grants of land were freely given, when offers of settlement were made ; but no rigid exaction of penalties followed the failure of the grantee to execute the purposes of improvement and settlement.

This court, in the case of *Percheman*, have decided upon the legality of the certified copy of the petition and grant, as evidence. In other cases, the same decision has been made. 12 Pet. 655. Cited also, in support of the general principles on which the title of the appellee rested, 6 Pet. 727,

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731, 738 ; 2 Pet. Dig. 313 ; *Sibbald's Case*, 10 Pet. 322 ; 6 Ibid. 735. It is considered as having been settled by the decrees of this court, in the Florida cases, that all other conditions, but those in mill-grants, are conditions subsequent.

CATRON, Justice, delivered the opinion of the court.—The first question arises upon the admission in evidence of the memorial of Mrs. Wiggins, and the decree thereon by the governor, Estrada, on the certificate of the secretary, Aguilar. They are as follows :

MEMORIAL FOR GRANT.

(Translation.) "His Excellency, the Governor; Isabel Wiggins, an inhabitant of the town of Fernandina, with the greatest respect, appears before your excellency, and states, that she has never importuned the attention of the government with petitions for lands, as she procured to support her family with the fruits of her industry, in this town ; but owing to the diminution of trade, she considers that she will have to devote herself to the pursuits of the country ; and wishing to establish herself on the eastern side of the Pond of St. George, she supplicates your excellency to be pleased to grant to her three hundred acres in the said place, as she has five *children³⁴⁵] and five slaves, with herself ; which favor she begs of the just administration of your excellency.

ISABEL WIGGINS."

"Fernandina, 1st August 1815.

DECREE.

"St. Augustine, 6th August 1815. The tract which the interested party solicits is granted to her, without prejudice to a third party ; and for the security thereof, let a certified copy of this instance and decree be issued to her, from the secretary's office.

ESTRADA."

CERTIFICATE OF AGUILAR.

"I, Don Tomas de Aguilar, sub-lieutenant of the army, and secretary of the government of the place and province of East Florida, for his majesty, do certify, that the preceding copy is faithfully drawn from the original which exists in the secretary's office, under my charge, and pursuant to the order, I give the present, in St. Augustine of Florida, on the sixth of August, 1815.

TOMAS DE AGUILAR."

Before the memorial and concession were offered in evidence, Elizabeth Wiggins made affidavit : "That in August 1815, she petitioned for the grant ; that she received, shortly after, from the secretary of the government, a certified copy of the petition and decree ; that she never had had possession or control of the original ; that she always understood that it was, at the date thereof, placed in the proper public office, as was usual in such cases ; that she understood from her counsel, the same could not be found ; and that she is ignorant what has become of the same." The affidavit was objected to, on the part of the United States, and rejected by the court, and the evidence offered received, without its aid ; on proof being made of the handwriting of Aguilar, the government secretary.

Much evidence was introduced to prove the practice and rules in use in the offices of the Spanish government, from which titles to lands issued. We think the evidence was admissible ; the existence of a foreign law, especially

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when unwritten, is a fact to be proved, like any other fact, by appropriate evidence. The Spanish province of Florida was foreign to this country, in 1815, when the transaction referred to purports to have taken place. A principal witness to prove the practice in the government secretary's office, was Alvarez, who had been a clerk in it from 1807, to the time of the change of government, in 1821. He and others, establish beyond controversy, that persons wishing grants of land from the Spanish government, presented a memorial to the governor, and he decreed on the memorial, in the form pursued in Mrs. Wiggins's case; that the decree of the governor was filed in the secretary's office, and constantly retained there, unless, in cases where a royal title was ordered to be issued, when the the decree was transferred [*346 *to the *escribano's* office. Mrs. Wiggins's is a case of the first class; and the petition and decree could not be removed from the government secretary's office. These papers were not recorded in books there, but kept in files or bundles.

The evidence given to the grantee was a certified copy of the decree, or of the memorial and decree, by the government secretary; and that it was one of the ordinary duties of the secretary to make certified copies of memorials and decrees for the use of the parties. Generally, the decree of the governor directed the copy to be made for the use of the party; and copies made by the government secretary, and certified by him, were generally received as evidence of title in the Spanish courts of justice; the copies were made immediately after making the decree, and delivered to the party, when he called for them. No seal was affixed to the secretary's certificate; which was evidence of the facts to which it certified, in a case like this. From the evidence of the duties incumbent on the government secretary of Florida, derived from this record, and other sources, we have no doubt, the duties were such as proved; that the secretary was the proper officer appointed by law to give copies; and that the law trusted him, for this particular purpose, so far as he acted under its authority. It follows, in this case, as in all others where the originals are confined to a public office, and copies are introduced, that the copy is (first) competent evidence by authority of the certificate of the proper officer; and (second) that it proves, *prima facie*, the original to have been of file in the office, when the copy was made. And for this plain reason, the officer's certificate has accorded to it the sanctity of a deposition; he certifies, "that the preceding copy is faithfully drawn from the original, which exists in the secretary's office, under my charge."

The same doctrine was holden in this court in *Owings v. Hull*, 9 Pet. 624-5. The copy of a bill of sale for slaves, made and of record in a notary's office, in New Orleans, was offered in evidence, without accounting for the original; and objected to for this reason. By the laws of Louisiana, the original could not be removed from the notary's office; and he was authorized to give a copy. This was received and deemed evidence of what was contained in the original; and of course, that it existed when the copy was made. Again, in *Percheman's Case*, 7 Pet. 85, it was decided by this court, that a copy of a Spanish grant, certified by the government secretary, could be given in evidence, without accounting for the non-production of the original; and this, on general principles, which did not require the aid of legislation; much reliance in that case having been placed upon acts of con-

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gress to give effect to the certificate. This court, in the *United States v. Delespine*, 12 Pet. 655, recognised the principle, that a certified copy, such as the one before us, was evidence, for there a copy of the first copy was introduced : and when speaking of the first copy, the court say, "the *347] *first copy was made from the original filed in the proper office, from which the original could not be removed for any purpose. That copy, it is admitted, would have been evidence in the cause." The original copy having been lost, and no decree being found in the government secretary's office in favor of Delespine, although there was proof that one had existed, the copy of the first copy was received, and a decree founded on it. Delespine's case is, however, prominently distinguishable from the present on the main point in controversy ; in that case, there was positive proof of the existence in the secretary's office of the original concession ; here there is none, save the inference that arises from Aguilar's certificate, with some other circumstances : and the question is, can a decree for the land be founded upon these proofs ; in the face of the fact, that no decree, or evidence of the claim, now exists, or has ever been known to exist, in the proper office.

"We have established that the copy of the petition and decree are made *prima facie* evidence by the certificate of the secretary. What is *prima facie* evidence of a fact ? It is such as, in judgment of law, is sufficient to establish the fact ; and, if not rebutted, remains sufficient for the purpose." *Kelly v. Jackson*, 6 Pet. 632. And is it rebutted in this case ? Had the papers in the government secretary's office been carefully kept ; and had this claim been first brought forward, at a late day, as it is insisted in argument it was (that is, eighteen years after its date), then the presumption would stand against its original existence ; and it ought to be rejected, if the certificate had no support. But this is far from being the fact. The survey was made by the proper surveyor, for Mrs. Wiggins, March 23d, 1821, in conformity to the memorial and decree, and which refers to their date. Then again, she pursued this claim before the register and receiver of the land office of East Florida, whilst they acted as a board of commissioners for the examination of Spanish claims and titles ; and they rejected it, because there was no evidence of cultivation. Truly, the certificate and plat of the surveyor were only before them ; but as no exception appears to have been taken, for want of sufficient evidence of the existence of the concession, the circumstance of the non-production of it before the board, has not so much in it as was supposed in the argument.

The record shows why such vigorous exertions were made, either to reject or to destroy the force of Aguilar's certificate. The attorney for the government offered to prove by William G. Davis, that Aguilar, just before the delivery of the province was made to the United States, offered to forge a grant, in favor of the witness, for a tract of land ; and the attorney also offered to prove, by William Levington, that about the same time, Aguilar offered to forge, or did actually forge, under the signature of the former governor, White, of that province, a grant of land in favor of the witness ; which evidence the court rejected ; and, we think, correctly. Aguilar was not introduced as a witness ; but the proof offered sought to establish upon *348] him forgery and fraud in other instances, so as to *destroy the credit of his certificate in this. The secretary may have been honest and

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faithful in the discharge of his duties in 1815, and grossly the reverse in 1821; and although any number of frauds should be established upon him, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected with other frauds. 4 Pet. 297. If there had been a forgery in this instance, it is probable, it would have been brought to light, at the time the survey was made; the making of which is the controlling fact with this court, coming in aid of the certificate of Aguilar. For it must be admitted, that if the unsupported certificate had been brought forward, and the claim, for the first time, set up under it, in July 1833, eighteen years after it bears date; that it could not have furnished any foundation for a decree, or been evidence of title, worthy of credit. The lapse of time, the silence of the claimant, and her failure to have presented it for confirmation, would, under the circumstances, have been conclusive objections to its credibility. But the existence of the claim in 1821, is rendered certain by the return of the surveyor-general; and before the American tribunals, it has been steadily pursued.

Furthermore, the presumption that the original memorial and concession supposed to have been on file in the government secretary's office, have been lost or destroyed, is very strong. After the papers were taken possession of, in 1821, by the authorities of the United States, they were almost abandoned, in an open house, subject to the inspection and depredation of every one; many of the files were seen untied, and the papers scattered about the room; the doors and windows of the house being open. There can hardly be a doubt, that some of the papers were destroyed or lost. Nothing is therefore, found in the condition of the office, to rebut the *prima facie* presumption furnished by the secretary's certificate; as might be the case, had the papers been kept with proper care: and especially, had the concessions been numbered, and no number been missing.

The next question is, does the concession carry with it the conditions imposed by law on those having lands given to them for the purposes of settlement? The object of the applicant, Mrs. Wiggins, is distinctly set forth by her memorial; with the number of the family of which she was the head, that is, five children and five slaves, with herself. By the regulations of Governor White, published in 1803, it was declared, that to each head of a family there should be distributed fifty acres; and to the children and slaves, sixteen years of age, twenty-five acres for each one; but from the age of eight to sixteen years, only fifteen acres. Taking the slaves and children all to have been over sixteen, there being ten of them, would have entitled the applicant to two hundred and fifty acres on their account, and the fifty acres on her own; which would have made up the three hundred acres applied for.

The same ordinance provides, "That those employed in the city, *if lands be granted to them for cultivation, by themselves or their slaves; it shall be with the express condition, that he shall com- [*349] mence cultivation within one month after the concession of them, with the understanding, that if they do not do it, they will be granted to any one who will denounce him, and verbally prove it." And that all concessions, without time specified, shall be void, and held as though not made, if grantees do not appear to take possession and cultivate them within the term of six months. In the concession to Mrs. Wiggins, no time is specified for

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the settlement ; and the government of the United States may take advantage of the non-performance of the condition prescribed by law, if the eighth article of the treaty with Spain does not provide for the omission. It stipulates, "that grants of lands made by Spain, before the 24th of January 1818, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of Spain."

It was adjudged by this court, in the cases of *Arredondo* and *Percheman*, 6 and 7 Peters, that the words "shall be ratified and confirmed," in reference to perfect titles, should be construed to mean "are" ratified and confirmed, in the present tense. The object of the court in these cases was, to exempt them from the operation of the eighth article, for the reason that they were perfect titles by the laws of Spain, when the treaty was made ; and that when the soil and sovereignty of Florida were ceded by the second article, private rights of property were by implication protected. The court, in its reasoning, most justly held, that such was the rule by the laws of nations, even in cases of conquest, and undoubtedly so, in a case of cession ; therefore, it would be an unnatural construction of the eighth article, to hold, that perfect and complete titles, at the date of the treaty, should be subject to investigation and confirmation by this government ; and to reconcile the article with the law of nations, the Spanish side of the article was referred to, in aid of the meaning of the American side, when it was ascertained, that the Spanish side was in the present tense ; whereupon the court held, that the implication resulting from the second article, being according to the law of nations, that, and the eighth article, were consistent ; and that perfect titles "stood confirmed" by the treaty ; and must be so recognised by the United States, and in our courts.

The construction of the treaty being settled, a leading inquiry in the cases referred to was, were they perfect, unconditional Spanish grants ? *Percheman's* had no condition in it ; and the only difficulty involved was, whether it had been made by the proper authority. The court held it had been so made. The grant to *Arredondo* and son was for four leagues square, and made as a present grant from its date ; with the subsequent condition, that the grantees should settle and improve the land in three *350] years, and on failure, the grant should become void ; further, that they should settle on it two hundred Spanish families ; but no time was fixed for the performance of this condition. Possession was taken and improvements made, within the three years ; but the families were not settled, when the country was ceded. This court declared, that after the cession of Florida to the United States, the condition of settling Spanish families had become, probably, impossible, by the acts of the grantor, the government of Spain ; and certainly immaterial to the United States ; therefore the grant was discharged from the unperformed condition, and single.

That the perfect titles, made by Spain, before the 24th of January 1818, within the ceded territory, are intrinsically valid, and exempt from the provisions of the eighth article, is the established doctrine of this court ; and that they need no sanction from the legislative or judicial departments of this country. But that there were, at the date of the treaty, very many claims, whose validity depended upon the performance of conditions in

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consideration of which the concessions had been made, and which must have been performed, before Spain was bound to perfect the titles ; is a fact rendered prominently notorious by the legislation of congress and the litigation in the courts of this country for now nearly twenty years. To this class of cases, the eighth article was intended to apply ; and the United States were bound, after the cession of the country, to the same extent that Spain had been bound before the ratification of the treaty, to perfect them by legislation and adjudication : and to this end, the government has provided that it may be sued by the claimants in its own courts ; where the claims shall be adjudged, and the equities of the claimants determined and settled according to the law of nations, the stipulations of the treaty, and the proceedings under the same, and the laws and ordinances of the government from which the claims are alleged to have been derived. These are the rules of decision prescribed to the courts by congress, in the act of 1824, ch. 173, § 2, passed to settle the titles of Missouri and Arkansas ; and made applicable to Florida, by the act of 1828, ch. 70, § 6. By the sixth section of the act of 1824, the claimant who has a decree in his favor, is entitled to a patent from the United States ; by which means his equitable claim draws to it the estate in fee. These are the imperfect claims to which the eighth article of the treaty with Spain refers.

That a Spanish concession, carrying on its face a condition, the performance of which is the consideration for the ultimate perfect title, is void, unless the condition has been performed in the time prescribed by the ordinances of Spain ; was decided by this court after the most mature consideration, in the cause of the *United States v. Kingsley*, 12 Pet. 476, which is the leading decision upon the imperfect titles known as mill-grants ; and which has been followed by all others coming within the principles then, with so much care *and accuracy, laid down. The concession to Mrs. Wiggins, carrying with it the conditions incident to settlement- [*351 rights, by the ordinances and usages of Spain ; a brief notice, in addition to what has already been said, will be taken of the regulations and ordinances governing the case. As to the first point, the practice of the government in disposing of the public domain, may be proved by those familiar with the customs ; and there is in the record, very satisfactory proof by witnesses of the laws and customs governing the provincial authorities in this respect ; but as the proof is in exact accordance with the published ordinances on the subject, of course, the written law will be relied upon.

After the passage of the act of 1823, it was the opinion of the attorney-general of the United States, that it was indispensable to the correct decision of the Florida claims by this court, that a correct translation into the English language should be made of the Spanish and French ordinances, affecting the land titles in that country. The task of translating and compiling them was assigned to Joseph M. White, Esq., then of Florida. The collection was accordingly made and translated, and the manuscript deposited in the state department ; and congress was informed of the fact, by a special message from the President of the United States, of February 11th, 1829. 2 White's *Recopilacion*, 9-10. It was afterwards published by Mr. White ; and latterly he has published a second and enlarged edition, which is the one referred to in this case.

The treaty with Spain for the cession of Florida, was signed 2d Febru-

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ary 1819 : on the 25th of November preceding, the political and military governor (Coppinger) caused to be published an ordinance setting forth the conditions on which concessions for settlement claims had been issued ; obviously, with a view to the future cession. 2 White's Recopilacion 282-5. From the ordinance, it appears, "that concessions made to foreigners or natives, of large or small portions of land, carrying their documents with them (which shall be certificates issued by the secretary), without having cultivated or ever seen the lands granted to them, such concessions are of no value of effect ; and should be considered as not made, because the abandonment has been voluntary, and that they have failed in complying with the conditions prescribed for the encouragement of population : " "and therefore, there is no reason why they should not revert to the class of public lands, making null the titles of cession which were made to them."

Ten years had been the time required for cultivation and occupation ; this rule was not rigidly adhered to, but the titles were perfected in some instances, where valuable improvements had been made, and the occupation had been short of ten years ; the governors taking into consideration the disturbed state of the country. These exceptions were abatements of the general rule, requiring ten years' cultivation and occupation : as Mrs. Wiggins, however, never cultivated, or occupied the land claimed, she took no *352] interest under the *rule, or any exception made to it ; and it is free from doubt, had Spain continued to govern the country, no title could have been made to her ; nor can any be claimed from the United States, as successors to the rights and obligations of Spain. It is, therefore, adjudged, that the decree below be reversed, and the petition dismissed.

This cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel : On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said superior court in this case be and the same is hereby reversed and annulled ; and that this cause be and the same is hereby remanded to the said superior court, with directions to dismiss the petition.

*353] *The Lessee of WILLIAM POLLARD'S Heirs, &c., Plaintiffs in error, v. GAUS KIBBE, Defendant in error. (a)

Error to state court.—Spanish treaty.

Action of ejectment in the state court of Alabama, for a lot of ground in the city of Mobile. The plaintiff claimed the title to the lot under an act of congress, and the decision of the state court was against the right and title so set up and claimed ; a writ of error was prosecuted to the supreme court of Alabama. It was held, that this case was embraced by the 25th section of the judiciary act of 1789, which gives this court jurisdiction to revise the judgment of the state court, in such cases.

The act of congress under which title was claimed, being a private act, and for the benefit of the city of Mobile, and certain individuals, it is fair to presume, it was passed with reference to the particular claims of individuals, and the situation of the land embraced in the law, at the time it was passed.

A lot of ground was granted by the Spanish government of Florida, in 1802, to Forbes & Com-

(a) Mr. Chief Justice TANEY was prevented from sitting in this case, by indisposition.

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pany, in the city of Mobile, which was afterwards confirmed by the commissioners of the United States; the lot granted was eighty feet in front, and three hundred and four feet in depth, bounded on the east by Water street. This, while the Spanish government had possession of the territory, was known as "a water lot;" in front of the lot was a lot which, at the time of the grant of the lot to Forbes & Company, was covered by the water of the bay and river of Mobile, the high tide flowing over it; and it was separated from Forbes & Company's lot by Water street. It was, afterwards, in part, reclaimed by Lewis, who had no title to it, and who was afterwards driven off by one of the firm of Forbes & Company; a blacksmith's shop was then put on the lot by him; and Lewis, again, by proceedings at law, obtained possession of the blacksmith's shop, it not being his improvement; the improvement was first made in 1823. The Spanish governor, in 1809, after the Louisiana treaty of 1803, and before the territory west of the Perdido was out of the possession of Spain, granted the lot in front of the lot owned by Forbes & Company, to William Pollard; but the commissioners of the United States, appointed after the territory was in the full possession of the United States, refused to confirm the same, "because of the want of improvement and occupation." In 1824, congress passed an act, the second section of which gave to those who had improved them, the lots in Mobile, known under the Spanish government as "water lots," except when the lots so improved had been alienated, and except lots of which the Spanish government had made "new grants," or orders of survey, during the time the Spanish government had "power" to grant the same; in which case, the lot was to belong to the alienee or the grantee. In 1836, congress passed an act for the relief of William Pollard's heirs, by which the lot granted by the Spanish government of 1809, was given to the heirs, saving the rights of third persons; and a patent for this lot was issued to the heirs of William Pollard, by the United States, on the 2d of July 1836: *Held*, that the lot lying east of the lot granted in 1802, by the Spanish government, to Forbes & Company, did not pass by that grant to Forbes & Company; that the act of congress of 1824 did not vest the title in the lot east of the lot granted in 1802, in Forbes & Company; and that the heirs of Pollard, under the second section of the act of 1824, which excepted from the grant to the city of Mobile, &c., lots held under "new grants" from the Spanish government, and under the act of congress of 1836, were entitled to the lot granted in 1809, by the Spanish governor to William Pollard.

The term "new grants," in its ordinary acceptation, when applied to the same subject or object, is the opposite of "old;" but such cannot be its meaning in the act of congress of 1824. The term was doubtless used in relation to the existing condition of the territory in which such grants were made; the territory had been ceded to the United States by the Louisiana treaty; but, in consequence of a dispute with Spain about the boundary line, had remained in the possession of Spain; during this time, Spain continued to issue evidences of titles to lands within the territory in dispute. The term "new" was very appropriately used, as applicable to grants and orders of survey of this description, as contradistinguished [354] from those issued before the cession.

The time when the Spanish government had the "power" to grant lands in the territory, by every reasonable intendment of the act of congress of 1824, must have been so designated with reference to the existing state of the territory, as between the United States and Spain; the right to the territory being in the United States, and the possession in Spain. The language "during the time at which Spain had the power to grant the same," was, under such circumstances, very appropriately applied to the case; it could, with no propriety, have been applied to the case, if Spain had full dominion over the territory, by the union of the right and the possession; and in this view, it is no forced interpretation of the word "power," to consider it here used as importing an imperfect right, and distinguished from complete lawful authority.¹

The act of congress of 25th March 1812, appointing commissioners to ascertain the titles and claims to lands on the east side of the Mississippi, and west side of the Perdido, and falling within the cession of France, embraced all claims of this description. It extended to all claims, by virtue of any grant, order of survey, or other evidence of claim whatsoever, derived from the French, British or Spanish governments; and the reports of the commissioners show, that evidence of claims of various descriptions, issued by Spanish authority, down to 1810, came under their examination. And the legislation of congress shows many laws passed con-

¹ See *Mobile v. Eslava*, 16 Pet. 234; *Mobile* 95; *Pollard v. Files*, 2 Id. 595; *Doe v. Eslava*, v. Hallett, Id. 261; *Mobile v. Emanuel*, 1 How. 9 Id. 421; *Pollard v. Kibbe*, Id. 471.

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firming incomplete titles, originating after the date of the treaty between France and Spain, at St. Ildefonso; such claims are certainly not beyond the reach of congress to confirm: although it may require a special act of congress for that purpose; such is the act of 2d July 1836, which confirms the title of William Pollard's heirs to the lot which is the subject of this suit.

The judgment of the supreme court of the United States, in a case brought by writ of error to a court of a state, must be confined to the error alleged in the decision of the state court, upon the construction of the act of congress, before the state court.¹

ERROR to the Supreme Court of the state of Alabama. In the circuit court for the county of Mobile, state of Alabama, an action of ejectment, for a lot of ground situated in the city of Mobile, was instituted by the plaintiffs in error, and was afterwards removed, by change of venue, to the circuit court for the county of Baldwin. It was tried before a jury in that court, and on the trial, the plaintiffs filed a bill of exceptions to the charge of the court. A verdict and judgment were given for the defendant. From this judgment of the circuit court, the plaintiffs prosecuted a writ of error to the supreme court of the state of Alabama; and the judgment of the circuit court, in favor of the defendant, was affirmed by the supreme court. The plaintiffs prosecuted this writ of error to the supreme court of the United States, under the 25th section of the judiciary act of 1789.

The following is the bill of exceptions filed by the plaintiffs, on the trial of the cause in the circuit court of the county of Baldwin:

On the trial of this cause, at the above term, the plaintiffs, to maintain the issue on their part, gave in evidence an instrument, signed by Cayetano Perez, written in the Spanish language, a translation of which is hereto annexed, as part of this bill of exceptions, but which instrument was shown to have been reported against, and rejected, by the commissioners appointed by the United States government to investigate and report on such matters, because of the want of improvement and occupancy.

*355]

*SPANISH GRANT (TRANSLATED).

"Mr. Commandant:—William Pollard, an inhabitant of the district, before you, with all respect, represents: that he has a mill established upon his plantation, and that he often comes to this place with planks and property from it, and that he wishes to have a place propitious or suitable for the landing and safety thereof; and that having found a vacant piece at the river side, between the channel which is called 'John Forbes & Company's,' and the wharf at this place, he petitions you to grant said lot on the river bank, to give more facility to his trading; a favor he hopes to obtain of you.

WILLIAM POLLARD."

"Mobile, 11th December 1809.

"Mobile, 12th December 1809.

"I grant the petitioner the lot or piece of ground he prays for, on the river bank, provided it be vacant.

CAYETANO PEREZ."

They further gave in evidence an act of congress, passed on the 26th day of May 1824, entitled an act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city. They further gave in evidence an act of congress, passed July 2d, 1836, entitled an act for the relief of William Pollard's heirs. They then gave in

¹ *Armstrong v. Athens County*, 16 Pet. 281.

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evidence a patent, dated the 14th day of March 1837, issued in pursuance of said act of congress of the 2d of July 1836, which patent embraced the premises in question. The plaintiffs further proved, that in the year 1813 or 1814, some wreck and drift wood was removed from the place where the premises in question now are, by the hands of William Pollard, the grantee.

The defendant gave in evidence a Spanish grant, dated 9th of June 1802, to John Forbes & Company, for a lot of ground, for eighty feet front on Royal street, with a depth of three hundred and four feet to the east, and bounded on the south by Government street; which grant was recognised as a perfect title, and so confirmed by act of congress. Attached to the original grant was a certificate signed by W. Barton, Register, Wm. Barnett, Receiver, P. M.; Attest—John Elliott, Clerk; a copy of which is the following:

PROCEEDINGS OF THE COMMISSIONERS.

Land-Office, Jackson Court-House.

Commissioners' Report, No. 2; Certificate, No. 3.

In pursuance of the act of congress, passed on the 3d of March 1819, entitled "an act for adjusting the claims to land, and establishing land-offices in the district east of the island of Orleans," we certify, that the claim No. 3, in the report of the commissioners, numbered 2 (claimed by John Forbes & Company, original claimant, Panton, Leslie & Company), is recognised by the said act as valid against any claim on the part of the United States, or right derived *from the United States; the said claim being for eighty feet in front, and three hundred and four in [356 depth, area, 24,320 feet, situate in the town of Mobile, and claimed by virtue of Spanish grant executed by J. V. Morales, and dated 9th of June 1802. Given under our hands, this 8th day of January 1820.

W. BARTON, Register.

WM. BARNETT, Register, P. M.

Attest—JOHN ELLIOTT, Clerk.

A map or diagram, indicating the property claimed, as well as that covered by the above grant, with other lots, streets, &c., was submitted to the jury, and to make a part of the bill of exceptions, by agreement between the counsel of the parties.

According to that map, and the proof, the lot sued for was east of Water street, and also immediately in front of the lot conveyed by the above-mentioned grant to John Forbes & Company, and only separated from it by Water street. The proof showed that, previous to 1819, then, and until filled up, as after stated, the lot claimed by plaintiffs was, at ordinary high tide, covered with water, and mainly so, at all stages of the water; that the ordinary high water flowed from the east to about the middle of what is now Water street, as indicated on the map referred to, between the lot claimed by plaintiffs, and that covered by the grant to John Forbes & Company. It was proved, that John Forbes & Company had been in possession of the lot indicated by their deed, since the year 1802; and that said lot was known, under the Spanish government, as a water lot; no lots at that time existing between it and the water.

It was proved, that in the year 1823, no one being then in possession, and

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the same being under water, Curtis Lewis, without any title, or claim under title, took possession of, and filled up, east of Water street, and from it, eighty feet east, and thirty-six or forty feet wide, filling up north of Government street, and at the corner of the same and Water street; that Lewis remained in possession about nine months, when he was ousted in the night by James Innerarity, one of the firm of John Forbes & Company; who caused to be erected a smith-shop, and from whom, Lewis, some time after, regained possession, by legal process, and retained it till he conveyed the same. Proved, that when said Lewis took possession, Water street, at that place, could be passed by carts, and was common. The defendant connected himself, through conveyances for the premises in controversy, with the said grant to John Forbes & Company, also with the said Curtis Lewis, also, with the mayor and aldermen of the city of Mobile; from each of which sources his title, if any, was derived by deed. It was admitted by the parties to the suit, that the premises sued for were between Church street and North Boundary street; this was all the evidence introduced on the trial.

On this evidence, the court charged the jury, that if the lot conveyed as
*357] above, to John Forbes & Company, by the deed aforesaid, *was known as a water lot, under the Spanish government, and if the lot claimed by the plaintiffs had been improved, at and previous to the 26th day of May 1824, and was east of Water street, and immediately in front of the lot so conveyed to John Forbes & Company, then the lot claimed passed, by the act of congress of the 26th of May 1824, to those at that time owning and occupying the lot so as above conveyed to John Forbes & Company. The court further charged the jury, it was immaterial who made the improvements on the lot on the east side of Water street, being the one in dispute; that by the said acts of congress, the proprietor of the lot on the west side of Water street, known as above, was entitled to the lot on the east side of it. To which charges of the court, the plaintiffs, by their counsel, excepted, and this was signed and sealed as a bill of exceptions.

The case was argued by *Test* and *Webster*, for the plaintiffs in error; and by *Key*, for the appellee.

For the *plaintiff* in error, it was contended, that the charge in the circuit court of Baldwin county, was erroneous; and the judgment of the superior court of Alabama should be reversed: 1. Because plaintiff had a good title, under his original grant, the confirmation thereof by the act of congress of the 2d July 1836, and the patent issued in pursuance thereof. 2. The construction put by the judge who tried the cause, on the act of May 26th, 1824, was not the true construction of that act. 3. The said charge to the jury was not warranted by the evidence set forth in the said bill of exceptions.

The counsel for the plaintiffs in error stated, that the question in the case was, whether the grant to Forbes & Company, dated 9th June 1802, which had been confirmed by the commissioners of the United States, on the 8th of January 1820, conveyed the lot in front of the lot of Forbes & Company, which is now claimed by Pollard's heirs.

The plaintiffs had a good and valid title to this lot. They rely on the provisions of the act of congress of 1826. They do not claim as riparian proprietors. Pollard was in possession of the property, as is shown by the

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act of congress of 1826 ; and the patent to him was granted under that law. The patent is the highest evidence of title, and the court will not look beyond or behind it. If the original grant by Governor Cayetano Perez was of no value, yet the act of 1836 gave it life, and made it a legal, valid and indisputable title, against any equitable title ; and the defendants have nothing but an equitable title. Cited, the Act of Congress of the session of 1836-37.

The defendants claim under an act of congress granting certain lots to the city of Mobile. (4 U. S. Stat. 66.) A proper construction of this law negatives this claim. The law gives a title *to what is now called [358 "a water lot ;" not to what were called "water lots" by the Spanish law. Under the Spanish laws, grants were extended into the river ; and no water lots were granted, unless particularly described to be such, and so granted. The defendants exhibited no grant, specially describing the lot to be a water lot. The grant of the lot, by the act of 1836, recognises the lot for which the plaintiffs in error contend, as a lot under a "new grant" of the Spanish government ; and the lot is given to the heirs of Pollard, the lessors of the plaintiffs in error. The defendants claim under the act of congress of 1824 ; and the act of 1836 is a legislative construction of that act.

The jurisdiction of the court in this case depends upon the question, whether an act of congress has been misconstrued by the supreme court of Alabama. Has this been so ? It has been said, that the original grant by the governor of Florida has been treated with scorn, and is of no value. That grants of this description having been for lands within the territory claimed by the United States, under the cession treaty of Louisiana, have always been disregarded. This is not so. Congress have in more than a thousand instances respected and confirmed such titles. In regard to the contest between the United States and Spain, under the Louisiana treaty, relative to the lands lying west of the river Perdido, possession of those lands was not obtained until 1823. The condition of a country, between the time it has been ceded, and the time when it is taken possession of, is determined by the law of nations. The rule of that law is, that nothing is changed until possession is taken of the country. It is not admitted, that congress could, before the United States took possession of the country, pass laws abrogating the established laws of Spain. Governments are, of all others, the parties on which the laws of the country which may have acquired the country by treaty, do not operate, before they are in possession.

It has often been decided in this court, that the government which is in possession of a country may make grants. In the case of the *State of Rhode Island v. State of Massachusetts*, 12 Pet. 748, the court say, "when a territory is acquired by cession, or even conquest, the rights of the inhabitants to property are respected and sacred." Grants of land by a government *de facto*, of parts of a disputed territory in its possession, are valid against the state which had the right. 8 Wheat. 509 ; 12 Ibid. 535 ; 6 Pet. 712 ; 8 Ibid. 445 ; 9 Ibid. 139 ; 10 Ibid. 330, 718. The act of congress of 1804 speaks of and relates entirely to past cases. See Act of 26th March 1804, § 14. It declares the titles referred to in it to have been, and to be, null and void. Land Laws 500.

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There is no objection to the title of the plaintiffs in error, on the ground, that it was not confirmed by the commissioners of the United *States. *359] Their decision does not disaffirm the title. After the refusal of the commissioners to allow it, an action may be brought upon it. Was the grant refused by the commissioners, because of the provisions of the treaty for the cession of Louisiana? The commissioners say, it was refused "because of the want of proof of cultivation and occupation." Grants made after the treaty have been confirmed in many cases; among them a grant to Forbes & Company. There was a title in the heirs of Pollard, under the grant, but the supreme court of Alabama decided upon the act of congress of 1824. The grants made after the treaty have been so often confirmed, that the circumstance shows what was meant in the act of congress under which the plaintiff in error claims, by "new grants." "New grants" referred to the period of the treaty. The treaty was an epoch from which grants were characterized as new grants.

The grant to Forbes & Company, under which the claim of the plaintiffs in error is opposed, is for three hundred and four feet. It is nowhere said to go to the river. Thus, if a riparian right is claimed, at the common law, it is negatived by the description of the lot. The grantees are limited to the feet and inches stated in the grant, and have no claim to say the grant extends to high-water mark.

The act of congress of 1824 shows, that the grants by the Spanish government did not give riparian rights. If the grantees had such rights, why apply to congress to allow them? The plaintiffs in error had an equitable title, before 1824, which should have been protected. The subsequent act gave them a legal title.

The courts of Alabama have misconstrued the acts of congress. A construction has been given to the act of 1824, which rides over the title of the lessors of the plaintiffs in error; and this court only can correct the judgment of the state court. By the act of 1824, all the lots which belonged to no one, were given to the city of Mobile; but the first section of the act takes no title, equitable or legal, from any one. The construction of the second section of the act of 1824, which is claimed for the defendant, is such as will take away the property of another person. That construction is: If you find an improved lot, give it to the person who has an improved lot above it; thus, giving the lot to one who had no agency in the improvement. This is against the grammatical construction of the law, and against the just intentions of the national legislature. This will not be sustained by the court, unless they will allow one person to take the property of another, without compensation, and that the fair grammatical construction of the law shall be disregarded. The object of the law of 1824 was, to give lots not granted by the Spanish government, after the Louisiana treaty, styling such concessions "new grants," to the persons mentioned in the acts. "New grants" were excepted, and were left to the legislation of congress.

*Key, for the defendants.—The case presents but few points for *360] the consideration of the court. It is admitted on the part of the plaintiffs in error, that in 1824, the legal title to the lot in controversy was in the United States. If this was so, by the act of congress of 1824, it

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became vested in the defendants. Before 1824, the defendants had an equitable title, which was made a perfect legal title by that act. By the decisions of this court in *Foster v. Neilson*, 2 Pet. 253 ; and *Garcia v. Lee*, 12 Ibid. 511, Spanish grants, made for any part of the territory west of the Perdido, after the treaty of 1803 with France, by which Louisiana was ceded to the United States, are declared void. No equitable title under the Spanish grant, made after 1803, could exist against the United States.

The whole question between the parties in this case depends on the act of congress of 1824. It is to be admitted, that if this act is applicable to the title of the plaintiffs, the title is complete. If the title they claim is within the exception in that act, why ask or take a title under the act of 1836 ? The title of the defendants is under a Spanish grant of 1802, which has been confirmed by the United States. The grant was for ground to which the lot claimed by the plaintiffs in error was an accretion. After the treaty of 1803, the riparian rights by the common law, gave the right to this lot to Forbes & Company. Whatever was the Spanish law, before the treaty, afterwards, the common law prevailed. A just construction of this act of congress of 1824, gives the lot to the defendants ; and the judgment of the supreme court of Alabama should be sustained by this court.

THOMPSON, Justice, delivered the opinion of the court.—The writ of error in this case brings up the record of the final judgment of the supreme court of the state of Alabama. This case is brought here under the 25th section of the judiciary act of 1789 ; that court being the highest court of law in that state in which a decision could be had. It was an action of ejectment, brought to recover possession of a lot of land, in the city of Mobile. Upon the trial of the cause, the plaintiff claimed title to the premises in question, under an act of congress, and the decision in the state court was against the right and title so set up and claimed. It is, therefore, one of the cases embraced in this section of the judiciary act, which gives to this court jurisdiction to revise the judgment of the state court.

The act under which title was claimed, was passed on the 26th of May 1824 (4 U. S. Stat. 66), granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of that city. Although the judgment of this court must be confined to the error alleged in the decision of the state court, upon the construction *of the act of congress under which title was claimed, it becomes necessary, to the right [*361 understanding of the act which was drawn in question, to look at the state of facts appearing on the record. It being a private act, for the benefit of the city of Mobile and certain individuals, it is fair to presume, it was passed with reference to the particular claims of such individuals, and the situation of the land embraced within the law, at the time it was passed.

These facts, as they appear on the record, are briefly as follows : On the trial, the plaintiff gave in evidence an instrument signed by Cayetano Perez dated at Mobile, the 12th day of December, in the year 1809, purporting to be a petition of William Pollard, for a certain lot of ground, which is described as vacant, at the river side, between the canal, which is called John Forbes & Company's, and the wharf of this place, corresponding in description with the location of the lot in question ; and a grant accompanying the petition, in these words : "I grant the petitioner the lot or

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piece of ground he prays for, on the river bank, provided it be vacant ;” which grant was rejected by the commissioners appointed by the government of the United States, to investigate and report upon such claims, because of the want of improvement and occupation of the lot. The defendant gave in evidence a Spanish grant, dated the 9th of June, in the year 1802, to John Forbes & Company, for a lot of ground eighty feet front on Royal street, with a depth of three hundred and four feet to the east, and bounded on the south by Government street ; which grant was recognised by the commissioners as a perfect title, and so confirmed by congress. A map or diagram is referred to in the record, by which it appears, that the lot sued for is east of Water street, and immediately in front of the lot conveyed by the above-mentioned grant to John Forbes & Company, and only separated from it by Water street. It appeared in evidence, that previous to the year 1819, and until filed up by Curtis Lewis, the lot in question was, at ordinary high tide, covered with water, and mainly so, at all stages of the tide. That the ordinary high water flowed from the east, to about the middle of what is now Water street. It was proved, that John Forbes & Company had been in possession of the lot granted to them, since the year 1802 ; and that said lot was known under the Spanish government, as a water lot ; no lots at that time existing between it and the water.

In the year 1823, no one being in possession of the lot in question, and the same being under water, Curtis Lewis, without title, or claim under title, took possession of, and filled up, east of Water street, about thirty-six or forty feet wide, and eighty feet deep from Water street ; the filling up being north of Government street, at the corner of that and Water street. Lewis remained in possession about nine months, when he was ousted in the night-time by James Innerarity, one of the firm of John Forbes & Company ; who caused to be erected thereon a smith's shop. Lewis, some time after, regained the possession by legal process, and retained it until he conveyed away the same. When Lewis took possession, Water street, *362] at that place, could be passed by carts, and was common. The defendant connected himself, through conveyances for the premises in question, with the grant to John Forbes & Company, and also with Curtis Lewis, and the mayor and aldermen of the city of Mobile.

Such being the situation of the lot in question, and of the several claims to the same, the act of the 26th of May 1824 was passed. The first section of this act can have no bearing upon the claim set up to the lot in question. It only vests in the city of Mobile all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by this or any former act, and to which no equitable title exists in favor of any individual, under this or any other act. If, therefore, the second section applies to the lot in question at all, it is excepted out of the first section. That the second section does apply to this lot, has not been and cannot be doubted. That section is as follows : “ That all the right and claim of the United States to so many of the lots of ground, east of Water street, and between Church street and North Boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots known, under the Spanish government, as water lots, in the said city of

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Mobile, whereon improvements have been made, be and the same are hereby vested in the several proprietors and occupants of each of the lots heretofore fronting on the river Mobile; except in cases where such proprietor or occupant has alienated his right to any such lot, now designated as a water lot, or the Spanish government has made a new grant or order of survey for the same, during the time at which they had the power to grant the same, in which case, the right and claim of the United States shall be and is hereby vested in the person to whom such alienation, grant or order of survey was made, or in his legal representatives; provided, that nothing in this act contained, shall be construed to affect the claim or claims, if any such there be, of any individual or individuals, or of any body politic or corporate."

There are two facts to be collected from this description of the lots embraced in this section of the act, which must be kept in view in deciding this question, viz., that the lots on the west side of Water street were known under the Spanish government as water lots; and that the lots on the east side of Water street, are now known as water lots, and may properly be distinguished under the denomination of old water lots, and new water lots.

The only question for this court to decide is, whether the state court misconstrued this act, by deciding against the right and title set up under it by Pollard's heirs. The record states, that the court charged the jury, that if the lot conveyed as above to John Forbes & Company, by the deed aforesaid, was known as a water lot, under the Spanish government, and if the lot claimed by the plaintiffs had been improved, at and previous to the 26th day of May 1824 (the date of the law), and was east of Water street, and immediately in front of the lot so conveyed to John Forbes & Company, *then the lot claimed passed, by the act of congress of the 26th of May 1824, to those at that time owning and occupying the lot so as [363] above conveyed to John Forbes & Company. The facts hypothetically put by the court to the jury had been fully proved in the affirmative, and indeed, were not at all denied; to wit, that the lot conveyed to John Forbes & Company was known, under the Spanish government, as a water lot; and that the lot claimed by the plaintiffs had been improved previous to the 26th of May 1824, and was in front of the lot conveyed to John Forbes & Company.

The construction, therefore, of the court was, substantially, that the act conveyed the lot in question to the owners and occupants of the lot conveyed to John Forbes & Company. That such was the construction of the act given by the court, is conclusively shown, by the subsequent part of the charge; that it was immaterial who made the improvements on the lot in dispute, on the east side of Water street. That by the said act of congress, the proprietor of the lot on the west side of Water street, was entitled to the lot on the east side of it. If this construction of the act was erroneous, and against the right claimed by the plaintiffs, the judgment must be reversed. The act is, undoubtedly, very obscurely worded, and its construction, it must be admitted, is doubtful.

The principal difficulty arises upon the true understanding and reference of the words, "whereon improvements have been made;" whether they refer to improvements on the lot on the west side of Water street, or on the lot in question, on the east side of Water street. The grammatical con-

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struction would, undoubtedly, refer the improvements to the lot on the west side of the street, and would be carrying into effect what is believed to be the general course of policy in most of the United States, of giving a preference to the owner of land on the shore of navigable streams of water, to the right and privilege of the land under the water, between high and low water mark. And on the other hand, it would seem unjust, where actual improvements had been made on the land below high-water mark, to disregard and take away such improvements, and give them to the owner of the lot on the west side of the street.

The evidence as to the extent and value of the improvements on the lot in question is very loose, and affords but little information upon that point. They could, probably, have been but of little value. They were made by Curtis Lewis, he not having any title, or even claim of title. And it is not reasonable to suppose, that under such circumstances, and from the short time he was in possession before the passage of this act, that he would have made very valuable improvements. And if the intention of congress had been, to give the lots on the east side of Water street to those who had improved them, it would have required but a very plain and simple declaration to that effect; and might have been just and equitable, if such improvements were valuable. But it is difficult to conceive how *the
*364] phraseology in the act could have been adopted to indicate such intention.

It is not, however, necessary to decide upon the construction of this act, as between the conflicting claims of the owner of the lot on the west side of Water street, and those who had made improvements on the lot on the east side of that street. For there is excepted out of the act all cases where the Spanish government has made "a new grant," or order of survey for the same, during the time at which they had "the power" to grant the same; in which cases the right and claim of the United States are vested in the person to whom such grant or order of survey was made, or his legal representatives. And if the plaintiffs bring themselves within this exception, the right is secured to them. And this presents the question as to the construction to be given to this exception.

Two points of inquiry seem to be presented: one relates to the description of the grant or order of survey therein mentioned; and the other as to the time when made. The exception describes these grants or orders of survey as "new grants" or orders of survey. The term "new," in its ordinary acceptation, when applied to the same subject or object, is the opposite of old. But such cannot be its meaning, as here used; for there is no pretence that two grants or orders of survey, had at any time been issued for the same lot. Some other meaning must, therefore, be given to it. And it, doubtless, was used in relation to the existing condition of that part of the territory, when grants or orders of survey like the one in question were made. The territory had been ceded to the United States by the Louisiana treaty; but in consequence of some dispute with Spain respecting the boundary line, this part of the territory remained in the possession of Spain. And it is a fact, established by the public documents, and laws of congress, and cases which have come before this court, that during the period between the cession by France, and the acquiring possession by the United States, Spain continued to issue evidences of title, of various descriptions; some, complete

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grants, and others, which were only inchoate rights or concessions. And the term "new" was very appropriately used as applicable to grants and orders of survey of this description, as contradistinguished from those issued before the cession. And this construction is rendered certain, when the description of the grants is connected with the subsequent part of the sentence, as to the time when made, to wit, during the time at which the Spanish government had "the power" to grant the same. This time, according to every reasonable intendment, must have been so designated with reference to the existing state of the territory, as between the United States and Spain; the right to the territory being in the United States, and the possession in Spain. The language, "during the time at which Spain had the power to grant the same," was, under such circumstances, very appropriately applied to the case. It could with no propriety have been applied to the case, if Spain had full dominion over the territory, by the union of right and possession; and in this view, it is no forced interpretation of the word power, to consider it here used, as importing an imperfect [365 right, and distinguishable from complete lawful authority. And indeed, no other sensible construction can be given to the language here used; and the course of the government of the United States, with respect to the claims originating during this period would seem necessarily to call for this construction. The act of congress of the 25th of April 1812, appointing commissioners to ascertain the titles and claims to lands on the east side of the river Mississippi, and west of the river Perdido, and falling within the cession by France, embraced all claims of this description; it extended to all claims, by virtue of any grant, order of survey, or other evidence of claim whatsoever, derived from the French, British or Spanish governments. And the reports of the commissioners, show that evidence of claims of various descriptions, issued by Spanish authority, down to the year 1810, came under the examination of the commissioners; and the legislation of congress shows many laws passed confirming incomplete titles, originating after the date of the treaty between France and Spain, at St. Ildefonso.

Such claims are certainly not beyond the reach of congress to confirm, although it may require a special act of congress for that purpose; and the present claim being founded upon such act, distinguishes it from the doctrine of this court in the cases of *Foster v. Neilson*, 2 Pet. 253, and *Garcia v. Lee*, 12 Ibid, 511. And such claims have been recognised by this court as existing claims, and not treated as being absolutely void. In the case of *Delacroix v. Chamberlain*, 12 Wheat. 590, an order of survey, issued during this period, came under the consideration of the court. It bore date in the year 1806. The court said, this order of survey was not sufficient to support an action of ejectment, not having been recorded or passed upon by the board of commissioners, so as to vest a legal title. But the court observed, that this order of survey bears date at a time when the Spanish authorities were in the actual possession of Mobile, where the land lies, and it was claimed as a part of the Floridas, then belonging to the Spanish crown; and the United States claimed it as a part of Louisiana. That the United States, having since purchased the Floridas, without having previously settled the controverted boundary, rendered it unnecessary to examine these conflicting claims. And the court add, if the United States and Spain had settled this dispute by treaty, before they extinguished the claim of

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Spain to the Floridas, the boundary fixed by such treaty would have bound all parties. But as that was not done, the United States have never, so far as we can discover, distinguished between the concessions of land, made by the Spanish authorities, within the disputed territory, while Spain was in the actual possession of it, from concessions of a similar character made by Spain, within her acknowledged limits. We will not, therefore, raise any question upon the ground of want of authority in the intendant to make such concession. Nothing more *is to be understood from this case, *366] than that the court did not consider the circumstance that the concession being made whilst Spain was in the actual possession of the territory, had prevented congress from acting on the subject of such concessions. And when congress, in the act of 26th of May 1824, excepts certain grants or orders of survey, made by Spain, during the time at which they had the power to grant the same, the conclusion is irresistible, that it included grants like the one to William Pollard, now in question. This grant bears date on the 9th day of December, in the year 1809, and was rejected by the commissioners, for want of improvement and occupation; and not because it was absolutely void. But suppose, it had been void, under the then existing laws in relation to these lands, it could not prevent congress from afterwards confirming this grant. The act of the 26th of March 1804, § 14 (2 U. S. Stat. 287), declaring certain grants void, could not affect the one to Pollard, which was made in the year 1809, after the passage of that law.

But if the construction of the act of the 26th of May 1824 is doubtful, as it is admitted to be, the act of the 2d July 1836 is entitled to great weight in aiding to remove that doubt. It is an act specially for the relief of William Pollard's heirs. It declares, that there shall be and hereby is confirmed unto the heirs of William Pollard, deceased, a certain lot of ground, situated in the city of Mobile, and bounded as follows, to wit: On the north by what was formerly known as John Forbes & Company's canal; on the west by Water street, on the south by the King's wharf, and on the east by the channel of the river; being the description of the lot now in question; and directing a patent to be issued in the usual form for the same. There is a proviso, declaring that this act shall not interfere with or affect the claims of third persons. But giving to this proviso its full force and effect, the enacting clause is a legislative construction of the act of 1824, and locates the patent thereby directed to be issued upon the lot now in question. They are acts *in pari materia*, and are to be construed together; and in such a manner, if the language will reasonably admit of it, as to permit both acts to stand together and remain in full force. It is not to be presumed, that congress would grant or even simply release the right of the United States to land confessedly before granted. This would be only holding out inducements to litigation. And these two acts cannot stand together without considering the lot in question as coming within the exception of the act of 1824; and the act of 1836, as a confirmation (as it purports to be) of the title to the heirs of William Pollard.

The judgment of the supreme court of the state of Alabama is, accordingly, reversed.

McLEAN, Justice.—I agree to the judgment of reversal in this case; and as my opinion is mainly founded on the construction of the second section

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of the *act of 1824, without reference to the exceptions it contains, I will state, in a very few words, my views in regard to that section. It declares, "that all the right and claim of the United States to so many of the lots of ground east of Water street, and between Church street and North Boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots known, under the Spanish government, as water lots, in the said city of Mobile, whereon improvements have been made, be and the same are hereby vested in the several proprietors and occupants of each of the lots heretofore fronting on the river Mobile; except in cases where such proprietor or occupant has alienated his right to any such lot, now designated as a water lot, or the Spanish government has made a new grant," &c. The lots first named in this section are those to which the right of the United States is relinquished; and those lots are now denominated water lots, in contradistinction to those called water lots under the Spanish government.

"All the right and claim of the United States is relinquished to so many of the lots of ground;" then follows a description of the locality of these lots, lying "east of Water street, and between Church street and North Boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots known, under the Spanish government, as water lots, in the said city of Mobile;" and here the description of the locality of these lots ends, and the words "whereon improvements have been made," follow. Now, I entertain no doubt, the improvements must be made on the lots first named, and to which the United States relinquish their right; and not on those lots named merely to show the local situation of the present water lots. And this is the construction given to the section by the supreme court of Alabama. The improvements then must be made on the water lot; and the lot in controversy in this case is a water lot.

The court instructed the jury, that "if the lot claimed by the plaintiffs had been improved, at and previous to the 26th May 1824, and was east of Water street, and immediately in front of the lot so conveyed to John Forbes & Company, then the lot claimed, passed, by the act of congress, to those at that time owning and occupying the lot so as above conveyed to John Forbes & Company; and that it was immaterial who made the improvements on the disputed lot." The second section gives to the proprietor of the lot fronting the water lot, such water lot, provided it has been improved.

Now, two things must concur, to give a title under this act; and these are, proprietorship of the front lot, and improvements on the water lot. But by whom must these improvements be made or owned, at the passage of the law? The act does not specify; and the court instructed the jury that if improvements were made, it was not material by whom they were made. Can this be the true construction of the act? Congress did not intend to give to the proprietor of the front lot *the water lot, unless it was improved; nor did they intend to give to the person who had improved the water lot, such lot, unless he was the proprietor of the front lot. The improvements of the water lot were as essential to the claim of title, under this act, as the proprietorship of the front lot. And can it be supposed, that congress intended to give the water lot to the proprietor of

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the front lot, for the reason that the water lot had been improved by a stranger? In other words, that congress, by a solemn act of legislation, would give a lot of ground to one man, because it had been improved by another? This is the principle asserted by this construction; and it is so unjust, and so directly opposed to the legislation of congress, in regard to the pre-emptive rights, on the ground of improvements, that I am unwilling to sanction it. There is no instance in the entire history of legislation by congress, where they have sanctioned such a principle. The policy has been to secure to the individual the benefits of his own labor and expenditure. And I am of the opinion, that unless the proprietor of the front lot was, on the 26th May 1824, also the proprietor of the improvements on the water lot, he can claim no title under the act.

BALDWIN, Justice.—I fully concur with the court on all the points embraced in their opinions, as well as the reasons assigned; being fully satisfied with the construction given to the acts of congress of 1804, 1824 and 1836, I have no desire to add anything to the conclusive views presented in the opinion. But there are other important considerations necessarily connected with the merits of the case, which induce me to notice them in a separate opinion, leading to the same conclusion on other grounds.

As it has been my assigned duty on several occasions to examine the subject of claims and titles to land, in the various territories which the United States acquired by cession from Georgia, France and Spain; a broad and varied field of investigation has been opened, on a part of which there has been no opinion of this court as yet delivered. That part is a review of the political condition of the territory between the Perdido and Mississippi, from 1800 to 1821, under the Louisiana treaty, the various acts of the executive and legislative departments of this government, in relation to its cession, occupation, government and adjustment of claims therein, the constitution and laws of nations, before the ratification of the treaty of 1819; and in connection with that treaty, the judicial exposition of both treaties by this court. It is a subject of high concern to numerous claimants of land within that territory; to the United States, both in interest and in relation to the formal complaints made by Spain of the omission "to cause the grants of the king to be respected, according to the stipulation of the eighth article of the treaty of 1819." This complaint was made soon after the decision of the case of *Foster v. Neilson*, in 1829; and in 1832, the secretary *369] of state, after the decision of the case of **Arredondo*, made to the house of representatives a long and full report in relation to these grants; in which he states the opinion of the executive department to be most decidedly in favor of their confirmation, on every ground on which they could be considered; and especially, on the faith and honor of the United States pledged in the treaty. He felt himself to be unable to answer what he declared to be the just demands and complaints of Spain, and assigned as the sole reason why the executive had not recommended an immediate confirmation of the grants by congress, the two decisions of this court in those two cases.

Under such circumstances, I take this occasion to throw this responsibility from the court, in the course now pursued, and hope to show most clearly that those decisions have hitherto been much missapprehended; and

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when taken in connection with subsequent ones, they most conclusively establish the right of the grantees of Spain in the disputed territory, derived from grants made between 1803 and 1810, while Spain was in the undisputed possession, west of the Perdido, independently of the treaty of 1819; *a fortiori*, by its stipulations. In so doing, I admit in the fullest manner, for all the purposes of this case, and the principles it involves, that this court is bound to take the east boundary of Louisiana to be the Perdido; that it was a political question, which having been settled by the political departments of the government, cannot be questioned in this; and that, as held in *Foster v. Neilson*, 2 Pet. 309, no title can be maintained under a Spanish grant, "singly" on the ground, that the Spanish construction of the treaty of 1803 was right, and the American construction wrong.

Keeping this principle in view, I shall consider the title of the plaintiff, under a Spanish concession, made in 1809, by the lawful authority of the king, independent of its confirmation by any special act of congress, as resting on its validity by the laws of nations, the constitution of the United States, the ordinance of 1787, the two treaties, and the general course of legislation by congress, in relation to government and property in the disputed territory. It will be observed, that the claim of the plaintiff was duly filed and recorded, pursuant to the acts of congress for adjusting claims to land west of the Perdido; he is, therefore, not deprived of any benefit which they confer, or rights which are reserved, but may rely on any support they may give to his title, by his having complied with all the requisitions enjoined. On a subject so broad, so interesting, so vitally affecting the rights of private property, under concessions by foreign powers, or the states of this Union, to the United States, the course of argument or opinion has hitherto been too limited, on the course of the political departments of the government, to save the necessity of the course herein pursued. It has been rather assumed, than deduced from that detailed investigation which can alone lead to a satisfactory result, on matters so complicated and interwoven into our system of territorial, state and federal governments.

*In 1800, Spain ceded Louisiana to France, by the treaty of St. Ildefonso, but retained peaceable possession till May 1803, when it was surrendered to France, in the same manner in which it was ceded by the previous treaty, declaring that, "the limits of both shores of the Mississippi shall remain for ever fixed by the treaty of Paris, in 1763; and consequently, the settlements from the river Manshack or Iberville, to the line which divides the American territory from the dominions of the king, shall remain in the possession of Spain, and annexed to West Florida. See 2 Pet. 303; White's Comp. 164. In October 1803, congress authorized the president to take possession of and occupy the territory ceded by France to the United States, and to organize a temporary government, "for maintaining and protecting the inhabitants of Louisiana, in the free enjoyment of their liberty, property and religion." (2 U. S. Stat. 243.) In December following, France surrendered the province to the United States, as it was ceded by Spain to France, under the same clauses and conditions, &c.; and as this court have declared, "in every respect with all its rights and appurtenances, as it was held by France, and received by France from Spain." 10 Pet. 732.

Spain then was in the possession of the disputed territory, by the consent

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of France, expressed in the surrender of Louisiana ; and the acceptance of the surrender by France to the United States, as she received it from Spain, was equally a consent by the United States to the continuance of the possession of Spain. Though the United States soon asserted her right to the "sovereignty and propriety" over and in the territory as far east as the Perdido, no attempt was made to disturb the possession of Spain till 1810. From 1803, till October 1810, the condition of the country was this : Spain was the acknowledged sovereign *de facto*, in the peaceable exercise of all the powers of government, and claiming to be also the sovereign *de jure* ; the United States neither asserting nor exercising the powers of a government *de facto*, but asserting her right as sovereign *de jure*, under the treaty of 1803 ; and as this court said, "No practical application of the laws of the United States to this part of the territory was attempted, nor could be made, while the country remained in the actual possession of a foreign power." 2 Pet. 304.

In October 1810, the president, by his proclamation, ordered military possession to be taken of the disputed territory ; declared the laws of the United States to be in force within it ; and ordered the inhabitants to be obedient thereto ; but it was also declared, that in the hands of the United States, the territory was "still left a subject of fair and friendly negotiation and adjustment," &c. And, "under the full assurance that the inhabitants shall be protected in the enjoyment of their liberty, property and religion." See 3 State Papers, Foreign Relations, 397-8 ; Proclamation at large. At this time, there was a revolutionary convention in session at Baton Rouge, within the disputed territory, claiming to be an independent *government, to be admitted into the Union ; and also claiming the *371] "unlocated lands" therein. Ibid. 395-6. In replying to these propositions, the secretary of state, in November 1810, in asserting the right of the United States as far as the Perdido, by the treaty of 1803, says, "the delivery of possession has, indeed, been deferred, and the procrastination has been heretofore acquiesced in by this government, from a hope, patiently indulged, that amicable negotiation would accomplish the purpose of the United States," &c. The secretary then makes these remarks : "The vacant land of this territory, thrown into common stock with all the other vacant land of the Union, will be a property in common for the national uses of all the people of the United States. The community of interest upon which this government invariably acts, the liberal policy which it has uniformly displayed towards the people of the territories (a part of which policy has ever been a just regard to honest settlers), will, nevertheless, be a sufficient pledge to the inhabitants of West Florida, for the early and continued attention of the federal legislature to their situation and their wants." Ibid. 398. In inclosing the president's proclamation to the governor of Mississippi, the secretary of state directs him to do whatever his powers will warrant, to "secure to the inhabitants the peaceable enjoyment of their liberty, property and religion ; and to place them, as far as may be, on the same footing with the inhabitants of the other districts under his authority." Ibid. 396-7.

In January 1811, the president recommended to congress, in a confidential message, the expediency of authorizing him "to take temporary possession of any part of Florida, in pursuance of arrangements with the

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Spanish authorities, and for making provision for the government of the same during such possession." 3 State Papers, Foreign Affairs, 394-5. A law was accordingly passed, giving the authority required, as to the territory east of the Perdido, and south of Georgia and the Mississippi territory, and for organizing a government for the protection and maintenance of the inhabitants of the said territory, in the full enjoyment of their liberty, property and religion. At the same time, congress resolved, under certain contingencies, on the "temporary occupation of the territory adjoining the south border of the United States; they at the same time declare, that the said territory shall in their hands remain subject to future negotiation." (2 U. S. Stat. 666.)

In February 1813, the president was authorized "to occupy and hold all that tract of country called West Florida, which lies west of the Perdido, not now in the possession of the United States;" for which purpose, and "for affording protection to the inhabitants, under the authority of the United States, the president was authorized to employ the military and naval force of the United States." (6 Laws of the United States 593.) This resolution and law remained unpublished till 1821, after the final ratification of the *treaty of 1819; but under them, the whole disputed territory was taken and held by the United States, till it was annexed to the [*372 adjacent states by acts of congress.

In 1812, that portion which was situated between the Iberville, the Mississippi, the east branch of Pearl river, and the Mississippi territory, was annexed to Louisiana, on condition that a law should be passed "securing to the people of the said territory, equal rights, privileges, benefits and advantages, with those enjoyed by the people of the other parts of the state." (See 2 U. S. Stat. 708.) A law was passed by Louisiana, in compliance with this condition. In May of the same year, that portion which was situated between the east boundary of Louisiana and the Perdido, was annexed to the Mississippi territory, to be governed "by the laws now in force, or which may be hereafter enacted, and the laws and ordinances of the United States relative thereto, as if the same had originally formed a part thereof," &c. (Ibid. 734); by subsequent acts, this part of the territory was divided between Mississippi and Alabama, and thence formed a part of those states, the former of which was admitted into the Union, before the signature of the treaty of 1819, and the latter in December following. 2 Pet. 308.

From this summary view of the course of the executive and legislative branches of the government, it is apparent, that they were in the assertion of the territorial rights of the United States, as claimed by them under the treaty of 1803; it is also apparent from the solemn pledges made by both departments, that the possession of the country was taken and held by force, yet subject to future negotiation as to the right of sovereignty and propriety, and full assurances to the inhabitants of being maintained and protected in the free enjoyment of their property.

Before proceeding to the stipulations of either treaty, it is now necessary to notice those acts of congress which are referred to in the president's proclamation of 1810, in which he declares, "That the acts of congress relating to this territory, though contemplating a present possession by a foreign authority, have contemplated also, an eventual possession of the said

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territory by the United States, and are accordingly so framed as to extend their operation to the same." 3 State Papers, For. Aff. 397. The principles of this proclamation were adopted by congress, whereby the laws which bound the inhabitants of the disputed territory, at the same time protected them in their rights of property, as completely as in the island of Orleans, or west of the Mississippi; these laws were suspended in their operation during the occupation of Spain, but applied to the whole country ceded by France to the United States, as soon as it came into their possession, and their provisions, from the first to the last, are of a uniform character. Whenever congress gave authority to take possession of the ceded territory, and provide for its temporary government, the declared *object was, *373] "to maintain and protect the inhabitants in the enjoyment of their property," &c., as has been seen in the act of 1803. (2 U. S. Stat. 245.) By the act of 1804, it was provided, that "no law shall be valid which is inconsistent with the laws and constitution of the United States." (Ibid. 284.) "The laws in force in the said territory, and not inconsistent with this act, shall continue in force until altered, modified or repealed." (Ibid. 287.) The act of 1805, authorized a government similar to that of the Mississippi territory, and declared the ordinance of 1787 in force (except as to the descent of estates, and slavery), and continued the existing laws till altered, &c.; it also authorized the admission of the territory into the Union, according to the third article of the treaty of 1803. (Ibid. 322.)

As this act placed the whole ceded territory under the same system of government as Mississippi, we must look to the acts of 1798 and 1800, which organized a government over that territory (before any cession was made by Georgia to the United States), without the consent of Georgia, and while the whole territory over which the United States thus assumed jurisdiction, was claimed by Georgia. This is necessary, in order to ascertain what effect the United States intended that their occupation of the territory then in controversy should have upon the rights of Georgia, or of the proprietors of lands claiming under that state. This is the more important, when the compact with Georgia, in 1802, is applied to the pre-existing state of things in the territory in dispute between her and the United States; for it will be found in all respects analogous to the state of things existing in the country west of the Perdido, before the treaty of 1819 took effect; and that the proclamation of the president, and the acts of congress, for taking the possession of West Florida, and annexing it to the contiguous territories first, and then to the states, contain pledges fully as strong, and to the same import, as those given to Georgia by this provision of the acts of 1798 and 1800: "That the establishment of the said government shall in no respect impair the right of the state of Georgia, or of any person or persons, either to the jurisdiction or the soil of the said territory; but the rights and claims of the said state, and of all persons interested, are hereby declared to be as firm and available as if this act had never been made. (1 U. S. Stat. 549; 2 Ibid. 69.)

In connection with this provision, it must be observed, that up to 1797, Spain had claimed and occupied the southern portion of the Mississippi territory, as part of Florida; pursuant to the treaty of 1795, she surrendered all the country north of the 31° north latitude to the United States. The words, "any" and "all persons," extend, therefore, as well to those

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who claimed lands north of that line under Spain, as those who claimed under Georgia; and as Spain had relinquished her rights to the territory, those of Georgia alone were noticed, while the grantees of either stood on the same precise footing under these laws. But the treaty of 1795, between *the United States and Spain, gave those claiming under her this protection. "It is also agreed, that the inhabitants of the territory of each [*374 party, shall respectively have free access to the courts of justice of the other; and they shall be permitted to prosecute suits for the recovery of their property, &c.; and the proceedings and sentences of the said courts, shall be the same as if the contending parties had been citizens or subjects of the said (same) country." Art 20. (8 U. S. Stat. 150.)

This analogy between the condition of the territory south of the 31° north latitude, and west of the Perdido, and that which lies north thereof, has been made the more applicable by the act of 1812, which, it has been seen, applies the laws and ordinances of the United States, and the laws then in force, to the territory west of the Perdido, precisely as "if it had formed originally a part of the Mississippi territory." (2 U. S. Stat. 708.) And as the act of 1804 put the territorial government of Louisiana and Mississippi on the same footing, all the laws applicable to the one must be applied to the other and every part of it, whenever the United States assumed the powers of government. The act of 1805 adopted the ordinance of 1717, enacted for the government of the territory north and west of the Ohio in general terms; the act of 1798 is more explicit in declaring, "that from the establishment of the said government, the people of the aforesaid territory shall be entitled to and enjoy all and singular the rights, privileges, and advantages granted "by that ordinance," in as full and ample manner as they are enjoyed "by them." (1 U. S. Stat. 550.) Among these rights, &c., are that of trial by jury, the writ of *habeas corpus*, judicial proceedings according to the course of the common law, the protection of property, the inviolability of contracts, and the right of admission into the Union, on an equal footing with the original states. (Ibid. 52, n.) In addition to which, the third article of the Louisiana treaty stipulates, that "the inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted, as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property and the religion they profess."

This, then, was the condition of the disputed territory and its inhabitants, from the time the United States took possession and governed it as a part of their territory. The right of sovereignty and general propriety remained subject to pending negotiation; the civil rights of the people, and their rights of property were protected by various acts of congress: the ordinance of 1717, the treaty of 1803, and the constitution of the United States. The local laws remained in force till altered, and the political rights of the people were such as existed in all the other territories. 1 Pet. 542. When these territories became states, the inhabitants thereof became *citizens of those states, and as such, entitled to all the rights which [*375 citizens enjoyed in other states; and the subjects of Spain, who owned or claimed property, had, by the 20th article of the treaty of 1795,

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the same right of suing for its recovery in the courts of the United States as one of its citizens had. 9 Pet. 234.

On this state of things, the treaty of 1819 had no influence; at the time, of its ratification, the whole disputed territory was annexed to the contiguous states; the inhabitants were incorporated in the Union, and were citizens of the United States; and the respective states, in virtue of what this court most truly denominate acts of "sovereign power," exercised by them under the treaty of 1803, over a part of what the United States insisted, and Spain denied, was a part of Louisiana; claiming only to stand in the place of the king, and during negotiation, the exercise the powers and rights which he had exercised till 1810; the United States had never attempted by law to impair any right of private property, or to insert such stipulation into the treaty of 1819 (2 White's Rec. 498), but expressly disclaimed such intention, and admitted the validity of all fair grants. Ibid. 499, &c.

Every public act of congress, from 1803 till 1813, which authorized the president to take possession of Louisiana, or to establish therein a temporary government, and every law which related to the subject, contained an express guarantee of property; the same guarantee was also given by the president in 1810, when in virtue of the act of 1803, he took forcible and military possession of the disputed territory. And congress confirmed this guarantee by their secret acts of 1811 and 1813; unless protection to the inhabitants of the territory consisted in confiscating their lands, and depriving them of the property acquired under the government and laws of Spain, while she held possession, with the consent of the United States. Every act of the executive and legislative branches of the government shows, that the contest with Spain was for the right of sovereignty over the territory, and the propriety in the vacant land therein; not for the right to what had been granted according to the laws of Spain, or which had otherwise become private property. 6 Pet. 735.

Claiming the territory between the Perdido and the Mississippi by the Louisiana treaty, the United States were bound, by the express terms of the second article, which includes "Islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks and other edifices, which are not private property." 7 Pet. 87-8. No land which was not vacant (no land which was private property), passed to the United States, but was excepted from the cession, not only by the second article, but by the guarantee by the United States, to the inhabitants, in the third article, of the free enjoyment of their property, until their admission into the Union. From the pledge to maintain and protect this right, the United States never set up any absolution, nor from the pledge to hold the territory subject to future negotiation. What was considered as *376] vacant land, by the executive department, *in 1810, has been seen by the letter of the secretary of state, on the same day as the proclamation of the president, that land which was to be thrown into the common stock, with all the other vacant land of the United States, for the national uses of all the people thereof; land which remained as a part of the royal domain, when the United States took possession, in virtue of the treaty of 1803, which was not private property.

This state of things as to government and property in the disputed territory, fully justified the view which the executive department of the gov-

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ernment took of this subject in 1832, which was in perfect accordance with the proclamation of the president, twenty-two years before, and with the course of the legislation from 1811 to 1819, in relation to the rights of private property in the disputed territory, held under grants of the Spanish authorities, before the United States took possession. It was, by both departments, the most solemn recognition of the principle, that a contest between the two governments concerning territorial boundary, did not and should not impair individual rights of property, and of its practical operation on grants made by the government in possession; and such recognition carried with it the most sacred obligations, to carry that principle out in all its consequences, independently of any stipulation in the treaty of 1819.

By third article of the Louisiana treaty, the United States were bound to protect and maintain the inhabitants of the ceded territory, "in the free enjoyment" of their "property," until they were incorporated into the Union; and when so incorporated, to admit them "to the enjoyment of all the rights, advantages and immunities of citizens of the United States." From the moment of such incorporation, the constitution of the United States, and its amendments, interposed between the inhabitants and the legislative power of the United States, the same guarantee which any citizen of any other state had a right to claim for the enjoyment of his property; and every proprietor, alien or citizen, had the same constitutional right to invoke the protection of the judicial power of the state or Union, against the invasion of his rights of person or property, wherever he might be located. 2 Pet. 235. That such incorporation was by acts "of sovereign power by the United States," exerted by military operations, expelling the existing authority of Spain, and compelling the inhabitants to submit to that of the United States, so far from diminishing, increases their constitutional and treaty obligation; for such forced submission is in the nature of articles of capitulation, the observance of which is enjoined by the laws and practice of all civilized nations. 1 Pet. 542. The proclamation of the president and the acts of congress declared the terms on which the United States established their authority; the inhabitants submitted, and thereby became entitled to the threefold protection of the constitution, treaty and law of nations. 2 Dall. 1, &c.

Had Spain made a voluntary transfer of the allegiance of her *sub-
jects in this part of Louisiana, as she did in the residue, the duty of [*377
the United States could not have been doubted; it never has been doubted
by any department of the government, or any member of it, as to every
other portion of the territory ceded by the treaty of 1803; and the universal
opinion of the people and government has been, that the rights acquired, and
the obligations imposed, by that treaty, were throughout concomitant. Spain,
indeed, might deny the right of the United States west of the Perdido, to
have become in any way strengthened by the annexation of that part of
Louisiana to the adjacent states, by an act of war or mere sovereign power;
but when the United States undertook to construe and execute the treaty in
their own way, and as they did, in asserting their rights accruing by the
cession, every rule and principle of national honor, faith and law would be
violated, if they should deny their duty to comply with the terms of the
treaty, which alone gave them any right, or with the pledges which they
gave, when they took possession in virtue of its stipulations. It matters not

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by what right the United States held the disputed territory, at the time of its incorporation into the Union ; had it been done without the color of right, or had East Florida been so incorporated, before the treaty of 1819, the consequences would have been the same ; by the very and sole act of such incorporation, the inhabitants became citizens of the United States, their property was protected, and alien proprietors became entitled to all right secured to them by any treaty between their sovereign and the United States.

In addition to these considerations, the acts of congress, from 1803 till 1811, before the United States took forcible possession, which, as the president declared in his proclamation in 1810, were "so framed" as to apply to that territory, whenever the contemplated eventual possession by the United States should take place, secured to the inhabitants every protection which those laws, the treaty and ordinance of 1787 could impart ; and no subsequent law has attempted to impair any right thus secured, denied its existence, or asserted any right in the United States to lands which were private property in 1810. A more clear and correct exposition of the policy and course of the United States cannot be presented, than the following remarks of the secretary of the treasury, in presenting a plan for the final adjustment of all claims by Spanish grants, pursuant to resolutions of the senate and house of representatives, in 1818.

"In presenting a plan of final adjustment, in which no other description of claims are comprehended than those which are founded upon patents and concessions issued by the several governments which have at different times exercised sovereign jurisdiction over the late province of Louisiana, as held by France, the undersigned, &c., has proceeded upon the conviction, that ample provision has already been made for the adjustment of all claims to lands contemplated by the resolution, founded upon evidence inferior to
 *378] patents and concessions. *He has arrived at this conviction, by a careful examination of the several acts of congress for ascertaining and adjusting land titles in Louisiana, which have been passed since the 20th day of December 1803, the period at which possession was taken of that province by the United States. This long series of acts, commencing with the 26th March 1804, and terminating with the 29th April 1816, presents an uninterrupted and uniform course of relaxation in favor of land-claimants of every description. This relaxation has generally been effected by comprehending descriptions of cases not recognised by previous acts, by extending the time within which notices of claims and production of evidence were required, and by giving authority, not only to decide upon such claims, but to revise and confirm such as had been previously rejected. When it is considered, that in all these respects, relaxations have been frequent, and that the evidence upon which the claims have, in the first instance, and in each successive revision, been decided, has in most cases been that alone which has been produced by the party in interest, it is extremely improbable, that injustice has been done by the rejection of claims which ought to have been confirmed. Considering, then, that the titles to lands in the state of Louisiana, west of the east boundary of the island of New Orleans, so far as they are derived from or dependent upon any act of congress, are correctly and finally settled ; nothing more is necessary than to prescribe a rule by which the validity of titles not dependent upon the acts of congress may be promptly and legally determined," &c. 3 State Papers, Public Lands, 393.

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The secretary then presented a bill, providing for the final adjustment of claims throughout the whole extent of Louisiana, including those in the disputed territory, but it was not enacted into a law; congress however continued to act as they had before done, in a spirit of unceasing liberality towards claimants, each successive law relaxing from the strictness of former ones. This is apparent from an inspection of the various acts of congress from 1805, in relation generally to claims to land in Louisiana; as the principles of this case require a reference only to those laws which relate to the territory between the Perdido and the Mississippi, the others need not be noticed any further than in the preceding general review by the secretary of the treasury, and the following declaration made by this court in 1827, in reference to the legislation of congress, which is quoted in the opinion in the present case: that "the United States have never, so far as we can discover, distinguished between the concessions of land made by the Spanish authorities, within the disputed territory, whilst Spain was in the actual occupation of it, from concessions of a similar character made by Spain within the acknowledged limits." 12 Wheat. 690-1. This declaration will be found to be fully justified by a reference to all the acts of congress, in relation not only to their whole territory acquired by the treaty of 1803, but to that which was acquired *by the compact or treaty of cession between Georgia and the United States, in 1802. By this compact, [*379 Georgia ceded to the United States the right of soil and jurisdiction, to all the territory within her chartered boundaries, which was situated west of the Chatahouchee, on certain conditions; one of which was, that all grants of land made by the British or Spanish governments, before the 25th October 1795, &c, should be confirmed; to carry which into effect, various laws were passed in 1803, 1804 and 1805. (2 U. S. Stat. 229, 283, 323.) These acts related to the territory north of 31° of latitude, which had been the subject of controversy between the governments of Florida, while under Great Britain, and Georgia, within which the governor of West Florida had made grants, before the cession to Spain, by the treaty of peace in 1783; within which Spain made grants from that time till 1797, when she gave up possession to the United States; and within which Georgia had also made grants up to the Mississippi. It was, therefore, in the strictest sense, disputed territory, claimed by the three parties, the United States, Spain and Georgia, at the date of the grants. The laws relating to the adjustment of titles to land therein, necessarily referred to grants made by a government *de facto*, which the United States denied was a government *de jure*; and the laws, being on a kindred subject, would, of course, be analogous in their provisions, and receive the same construction, as those which related to the territory which was in dispute between the United States and Spain from 1804 till 1821.

In examining the provisions of all the laws for adjusting the claims to lands in Louisiana and Florida, they will be found to be patented from those in relation to the compact with Georgia; and, as will be seen hereafter, have been construed alike by this court. The first law which related exclusively to claims to land west of the Perdido, was passed in 1812; the previous laws applied generally to Louisiana as ceded by the treaty, making no distinction between that part which was disputed, and that which was in the possession of the United States, as surrendered in 1803. But as the

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practical operation of the laws of the United States depended on the president, in his execution of the authority conferred on him by the act of 1803 (2 U. S. Stat. 245); it is evident, that these laws could not be carried into effect by establishing land-offices and organizing boards of commissioners to adjust claims to land within that part of the territory, which was at the time occupied and governed by Spain. No government can exercise legislative powers within the territory actually in the possession of another sovereign; this can be done only when such possession is displaced by force, or surrendered by treaty, or otherwise; hence it appears, that no provision was made for the adjustment of claims to lands west of the Perdido, till by the president's proclamation, the resolution and acts of congress, the United States had obtained possession of the greater part of West Florida. Then the act of 1812 provided for the appointment of commissioners, with the *380] powers conferred by former laws; directed all *claimants to lands in the disputed territory, to deliver notice and evidence of their claims within a limited time, and to state the written evidence thereof; whether the claims arose under the British, French or Spanish governments; together with the nature and extent thereof, &c. : provided, that where the claim is by a complete grant, it shall not be necessary to have any other evidence entered than the original grant, order of survey and plat of the land. On failure to deliver notice of the claim as required by law, the claim shall never after be confirmed or recognised by the United States, or any written evidence thereof, which shall not be recorded, ever after be admitted in evidence in any court of the United States, against any grant which may thereafter be made by the United States. (2 U. S. Stat. 715.) The commissioners are empowered to inquire into the justice and validity of all claims filed with them; and it is made their duty to ascertain whether the land claimed has been inhabited and cultivated, when it commenced, when it was surveyed, by whom, on what authority; and every matter which may affect the justice and validity of the claim; to arrange the claims into classes, according to their respective merits, and to make a report thereon for the final action of congress. (Ibid.) By the act of 1814, the commissioners were directed to receive evidence in support of any claims not embraced in the former law. (3 Ibid. 121.)

Pursuant to these laws, reports were made by the commissioners classifying the claims thus: 1. Claims founded on complete British, French or Spanish grants, which in their opinion are valid, agreeable to the laws, usages and customs of such governments; in all, 430 claims. 2. Claims founded on orders of survey (*requette*), permission to settle, or other written evidence of claim, derived from either government, which ought to be confirmed; in all, 426 claims. 3. Claims founded on complete grants said to be derived under such governments, which, in the opinion of the commissioners, are not valid; in all, 58 claims. 4. Claims founded on orders of survey, &c., which ought not to be confirmed; in all, 298. 5. Claims of actual settlers, not derived from either government; in all, 1420. See Reports of Commissioners; 3 State Papers, Public Lands, 6, 7, 5, 38-48, 13, 58, 59, 66, 67-76, 254-68.

The reasons for rejecting the third and fourth classes of claims, are founded on the 14th section of the act of 1804; that they were made after the cession by France to the United States; that the grants were unusually

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large, and made after Spain had ceased to have any right or interest in the soil : but it is added, "admitting the claim of the United States to the country above mentioned to be unquestionable (and I see no reason to doubt it), the question then arises, how far the possession of that country by the Spanish government, after the right of the United States accrued, ought to [*381 *affect those claims which were granted by the former government, during the time which intervened between the purchase, and the time when possession was taken by the United States? If the United States had taken possession of West Florida at the same time that they did of Louisiana west of the Mississippi, many serious injuries to individuals might have been prevented. As this was not the case, it becomes an inquiry of interest and importance, whether the government is not morally bound, both by considerations of equity and policy, to make them a compensation commensurate to the injuries they may have sustained. This could be done by making them donations of any quantity of land which the government may deem just ; particularly that class of claimants who have improved and cultivated their lands. They are not numerous ; and with few exceptions, their claims are moderate. It may not be impertinent also to remark, that generally speaking, they were such persons as were most liable to be deceived by the Spanish officers. In relation to that class of claimants who have not inhabited or cultivated their lands, which is generally the case with those who hold large claims, it appears to the commissioner, that the government of the United States is not legally bound to confirm them. Nevertheless, from a variety of considerations which will, doubtless, enter into the decision of this question, the government may deem it politic, either to confirm their claims to a certain extent, or in some other way to effect a compromise with them. Their unlimited confirmation would, in the opinion of your commissioner, seriously injure many individuals, some of whom probably resided on the lands before they were surveyed for the patentees." 3 State Papers, Pub. Lands, 66.

The reasons for adjudging the claims of the first class to be valid, are, that they "comprehend patents derived from the British and Spanish governments, at a time when they possessed and exercised the undisputed sovereignty of the soil ; and they ought, in the opinion of the undersigned commissioner, to be confirmed by the United States." 3 State Papers, Pub. Lands, 66. That he alluded to the sovereignty *de facto*, is evident ; for the list of cases under this class is that in which there appear eighty-six cases of grants, made by Spain after the date of the Louisiana treaty ; on twenty-seven of which no settlements were made till after the 20th December 1803. This is the more apparent in the reasons for confirming the claims of the second class, under incomplete titles. "Those made by Miro, &c., were originated by the Spanish authorities, prior to the purchase of Louisiana by the United States, and agreeably to the laws, usages and customs of the then existing government, would have been completed by the same power that made them." 3 State Papers, Pub. Lands, 66. In relation to the claims issued by Morales, subsequently to the aforesaid "purchase," &c., he observes, that "although, in his estimation, they do not occupy the same grade with those of the first class, *yet he conceives it just and equitable [*382 that they should be confirmed. This opinion is not predicated upon the validity of their orders of survey, but simply upon the fact, that they

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occupied and cultivated their lands, and complied with all the requisitions of the government which, at that time, exercised ownership over the soil. By reference to the register, it will be seen, that some of the last-mentioned claims exceed in quantity the ordinary donations made by the Spanish government, prior to the purchase of Louisiana by the United States. When this is the case, it is believed, the government of the United States may limit its confirmation to any extent which it may be deemed just, both in regard to the number of arpents in each tract, and the number of tracts claimed by the same person." In this class of incomplete titles, there are two hundred and sixty claims, by orders of survey, &c., made after the treaty of 1803, on few of which settlements were made till after 20th December 1803.

These reports were transmitted according to law, and laid before congress in 1816. 3 State Papers 6. In April 1818, the senate and house of representatives instructed the secretary of the treasury to report a plan for the final adjustment and settlement of these claims; which he submitted in December following, accompanied with the draught of a bill enacted 3d March 1819, and classing the claims as follows:

1. Claims founded on complete grants from the Spanish government, which are, in the opinion of the commissioners, valid, and agreeable to the laws, usages and customs of the said government. The first section declares, that "they be, and the same are hereby, recognised as valid and complete titles, against any claim on the part of the United States, or right derived from the United States." And certain claims under British grants are so recognised. (3 U. S. Stat. 528.)

2. Claims founded on orders of survey, permission to settle, *requette*, or any written evidence of claim derived from Spain before 20th December 1803, and the land cultivated, &c., before that day; which, in the opinion of the commissioners, ought to be confirmed. The second section declares that they "shall be confirmed in the same manner as if the title had been completed." Ibid; Burchard 316.

3. All other claims comprised in the reports of the commissioners, and which ought, in their opinion, to be confirmed, "the claimant shall be entitled to a donation not exceeding 1280 acres," &c.

4. All persons embraced in the reports who have no written evidence of claim, and had settled the land claimed before the 15th April 1813, "shall be entitled to the same as a donation," not exceeding 640 acres.

5. Every person in the list of actual settlers, who has no written evidence of title, and on the 12th April 1814, had inhabited or cultivated a tract of land, "shall be entitled to a preference on becoming a purchaser."

*383] *Time for filing claims is extended, and provision is made for a revision of claims which had not been recommended for confirmation. Under the provisions of the act of 1819, the commissioners reported numerous other claims for confirmation, comprising all classes. (See 3 State Papers, Pub. Lands 436, 442, 447-51), including lots in the town of Mobile; which reports were acted on by congress, by the act of 8th May 1822, as to the lots in Mobile (3 U. S. Stat. 699); and as to lands, by an act of the same date. (Ibid. 797.) In both these acts, the claims are classed as in the act of 1819; complete grants are recognised as valid, &c.; incomplete grants are confirmed, &c.; and donations made to settlers, &c., as was done by

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that act : and the last recognises the laws, usages and customs of Spain, as the test of a grant being complete to vest the title.

Both the acts of 1819 and 1822 being founded on the reports of the commissioners in 1816 and 1820, must be taken with reference thereto ; and recognising the claims therein reported as valid, to be complete titles, by their intrinsic effect. In the report of 1816, the commissioner says, those claims of the first class, "being founded on complete grants of former governments, we think, are good in themselves, on general principles, and therefore, require no confirmation by the government of the United States to give them validity" (3 State Papers 267); and in that of 1820, that "they are certainly entitled to unqualified confirmation (Ibid. 441); and in relation to surveys on incomplete grants, the same rule is adopted in relation to those laws, customs and usages. Section 4th directs the register and receiver, &c., except in relation to perfect titles, as recognised in the first section of the acts of 1819 and 1822, shall have power to direct the manner in which all lands claimed thereby shall be surveyed and located ; having regard to the laws, usages and customs of the Spanish government on that subject, and also to the mode adopted by the United States (3 U. S. Stat. 768); Burchard 352 ; 4 Story 2168. Subsequent laws extended the time for filing claims, and various reports continued to be made and laid before congress ; these laws were more liberal in their provisions than former ones, in accordance with the general policy of congress, and more especially on account of a strong remonstrance by the legislature of Louisiana on the subject. See 3 State Papers 430, 432 ; also, 3 Story 1907, 1909, 1968, 2009, 2017 ; Burchard 312, 394, 404.

By the act of 1832, provision was made for the adjustment of all claims filed by 1st July 1833 ; the sales of land in the disputed territory were suspended for one year ; and where claims were unconfirmed, but were embraced within the provisions of previous laws, and the land had been sold by the United States, the owners were entitled to receive the purchase-money for which the land was sold at public sale. (4 U. S. Stat. 561.) Pursuant to this act, reports were made and confirmed by the act of 1835 (Ibid. 749); and decisions in favor of land-claimants *pursuant to the act of 1835, were confirmed by the act of 1836. 4 Story 2514. [*384

From this review of the course of the executive branch of the government in 1810, and the decisive opinion expressed in 1832, as to the title to land in the disputed territory being valid in the view of the United States and Spain, during the negotiations which preceded the treaty of 1819 ; and from the whole legislation of congress from 1803 till 1836, there can remain no ground for mistaking their mutual understanding of the effect of the treaty of 1803, in its obligation on the United States to protect the private property of individuals in the disputed territory. In this respect, the treaty of 1819 was not taken into consideration ; for the United States were bound by every guarantee which a government could give to the people, as strongly as any new treaty would bind them ; but a new treaty was necessary, to disincumber the disputed territory from the pledges under which the United States took and held possession from 1810.

To this state of the disputed territory, as developed in the preceding review in relation to its government, and the rights of private property during an adversary claim by Spain and the United States, and pending

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negotiations for seventeen years, the final treaty must be referred, in order to ascertain its bearing on this case. The subjects of controversy were, the east and west boundary of Louisiana, according to the cession by Spain to France in 1800, and by France to the United States in 1803. The objects of the treaty were: 1. To define the west boundary: 2. To procure a cession of East Florida to the United States: 3. To settle the controversy as to the east boundary by a general cession and relinquishment of all the claims and pretensions of Spain east of the Mississippi: and 4. To stipulate the terms and conditions on which all past controversies should be terminated, and the cession made. The title of the treaty shows its nature: "A treaty of amity, settlement and limits;" its declared objects, and the intention of the parties are, "the adjustment of all differences," "to finally settle, determine and adjust all differences and pretensions by a treaty," "the restoration and permanent establishment of mutual and sincere friendship, to consolidate, confirm, and for ever maintain, the good correspondence which happily prevails, and with the most earnest desire of conciliation, and with the object of putting an end to all the differences which have existed between them." See the preamble to the treaty and the seventh article.

Art. 1. There shall be a firm and inviolable peace and sincere friendship between the United States and their citizens and his Catholic Majesty, his successors, and subjects, without exception of persons or places.

Art. 2. His Catholic Majesty cedes to the United States, "all the territories which belong to him east of the Mississippi, known by the name of East and West Florida," &c.; "and all vacant lands which are not private property."

*385] Art. 3. The first clause fixes the west boundary of Louisiana at the Sabine, &c. By the second clause, his Catholic Majesty "cedes to the United States all his rights, claims and pretensions to any territory east of said line;" and for ever renounced them.

Art. 8. Stipulates for the confirmation and ratification of "all the grants of land made before the 24th January 1818, by his Catholic Majesty or his lawful authorities, in the said territories, ceded by his Catholic Majesty to the United States," &c.

It is not necessary to take any further notice of the other parts of this treaty, or give any detail of its provisions; it suffices for all the purposes of this case, to consider it as having effected all its declared objects, according to the declared intention of the parties, without exception of persons or places. So both governments have ever considered it; and the once disputed territory has been peaceably held by the United States, according to the terms of its stipulations, and not by the mere force of the Louisiana treaty, or "the acts of sovereign power," exercised by the United States previous to the ratification. The political departments of the government have uniformly recognised its application to the disputed territory, as a cession and renunciation by Spain of all her claims and pretensions, and thereby putting a final end to all existing differences and disputes concerning boundary, under the treaties of 1800 and 1803. This court has also so considered it, by declaring, in 1827, that "the United States have since obtained the Floridas by purchase and cession from Spain" (2 Wheat. 600); and in the first sentence of their opinion in *Garcia v. Lee*, repeating this declaration in lan-

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guage which cannot be misapprehended or misapplied, in these words : "The land is situated in the state of Louisiana, and in the territory lying north of the Iberville, and between the Perdido and the Mississippi, which was so long a subject of controversy between the United States and Spain ; and which was finally settled by cession of the Floridas to the United States, by the treaty of February 22d, 1819." 12 Pet. 515. On this point, then, there is a perfect union of opinion by all the departments of the government, that this treaty applied to the disputed territory ; that it finally settled all former controversies concerning it, and that it was done by a cession by Spain, and a purchase by the United States.

These propositions are perfectly consistent with the assertion by the United States, of their original right to this territory under the former treaties ; they have bought their peace ; Spain has ceded her claims and pretensions ; though neither party has acknowledged the original right of the other (2 Pet. 310), yet both agree that, for the future, it belongs to the United States, in full sovereignty and propriety, as it was claimed by Spain. If, indeed, any doubt could be raised on the terms of the treaty, the interest of the United States requires, that they should be construed so as to effect the objects declared ; for if the cession and purchase do not include the disputed territory, the United States still hold it subject to future *negotiation, according to the declaration of the president in 1810, and congress in 1811. It has not and cannot be asserted, with truth, [*386 that there is yet subsisting a controversy between Spain and the United States on this subject ; nor can there be a suggestion of any act of cession, relinquishment by Spain, or any recognition of the right of the United States, unless it is found in the treaty of 1819 ; or any release of the pledge under which possession was taken by force, unless by the operation of its stipulations upon the territory thus seized ; and further, if the confirmation of grants by the eighth article, does not extend to those made for lands west of the Perdido, the clause which annuls those made after 1818, and the grant to Vargas, is equally inapplicable to defeat them ; and if there is any part of East or West Florida to which the treaty does not apply, or any exception of persons or places within either is made, by any construction of any part of the treaty, it is an express contradiction of the first article, which negatives all exceptions. The treaty must then be taken as the court have declared it ; or all its stipulations must be confined to East Florida, and that part of West Florida which lies east of the Perdido, leaving all controversies before subsisting in full force, as to territory west of that river.

The nature and character of this treaty forbid an interpretation which would make it a violation of the honor and faith of the United States, so often pledged ; and jeopard their interest, by considering the disputed territory to yet be in their hands, subject to future negotiation ; a conclusion from which there is no escape, if the negotiation which ended by the ratification of the treaty in 1821, did not settle all controversies. By referring to the terms of the ratification, there can be no doubt of the declared meaning of the king of Spain, and the treaty-making power of the United States, as well as to what was ceded to the United States, as the effect and force of the treaty when ratified, and the ratifications exchanged. In the act of the king, it is important to observe, that he declares the cession to be

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made by the second and third articles ; the bearing of which on the eighth article will be seen to have a most conclusive effect, when the case of *Foster Neilson* comes under review. The king says : "Whereas, on the 22d February 1819, a treaty was concluded," &c., "consisting of sixteen articles, which had for their object the arrangement of differences and of limits between both governments, and their respective territories, which are of the following form and literal tenor." Here follows the treaty. "Therefore, having seen and examined the sixteen articles aforesaid, and having first obtained the consent and authority of the general Cortes of the nation, with respect to the cession mentioned and stipulated in the second and third articles, I approve and ratify all and every one of the articles referred to, and the clauses which are contained in them," &c., "promising on the faith and word of a king, to execute and observe them, and to cause them to be executed and observed, entirely, as if I myself had signed them," &c.

*[387] In pursuance of the advice and consent of the senate, the president declared : "I," &c., "having seen and considered the treaty above recited, together with the ratification of his Catholic Majesty thereof, do," &c., "by these presents, accept, ratify and confirm the said treaty, and every clause and article thereof, as the same are herein set forth ;" and after the exchange of ratifications, declared : "Now, therefore, to the end that the said treaty may be observed and performed with good faith on the part of the United States," &c., "I do hereby enjoin and require all persons bearing office," &c., "and all others within the United States, faithfully to observe and fulfil the said treaty, and every clause and article thereof." 6 Laws U. S. 628, 631.

I cannot deem it necessary to reason on language like this, used in an act so solemn, by which two nations closed an inveterate controversy which had subsisted for seventeen years, on terms satisfactory to both ; in order to show what they intended as a mutual object, or whether they effected what they intended. An inspection of the treaty, from its title to the ratification, affords more conclusive evidence of its intention and effect than human ingenuity or reasoning can elicit by a commentary, or any effort to illustrate its provisions. It is what it purports, an amicable settlement of all past differences, without exception of persons or places, by a cession by one party of its rights to sovereignty, and the vacant land in the whole territory east of the Sabine river, which is not private property ; what is private property is excepted from the cession, by the terms of the second and third articles ; and one of the conditions of the cession is, the confirmation and ratification of all grants made before a certain time, for lands in the ceded territories, excepting three. Compensation is made for mutual claims ; all past complaints are redressed, and the United States hold the disputed territory, freed from all past pledges, by the consent of Spain ; and the stipulated confirmation of grants made by the king or his lawful authorities, saves his honor and faith pledged to the grantees. Peculiar force is to be given to this stipulation in the eighth article, when it is considered, that two full years elapsed between the signature and final ratification of the treaty ; and that the sole cause of the delay arose from those grants, one of which was for land west of the Perdido. 2 Pet. 312. Those having been annulled by the king, were excepted from confirmation, leaving all other fair grants within the stipulations of the eighth article, accord-

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ing to the declared intention of both negotiators of the treaty, of the parties thereto, and its true construction. Another decisive consideration of the effect of this treaty is presented, by taking it in connection with the treaty of 1803, and the various acts of the political departments of this government, before referred to; it applied to a territory which formed part of the states of this Union, and to its inhabitants, and other proprietors of land, who hold their property by the most sacred guarantee, and were already in the full fruition of *all the rights of citizens of the United States, and the states to which the territory had been annexed. [*388

It must be remembered, that as the United States claimed the territory west of the Perdido, in virtue of the treaty of 1803, they must hold it subject to its obligations and the terms of the cession; and that by first governing it as a portion of the territory of the United States, and afterwards annexing it to the adjacent states, the rights of property were protected by the ordinance of 1787, the constitution of the states, and of the United States. No new guarantee was given to the grantees of Spain, in the disputed territory, by the treaty of 1819; but it was a renewal of all former pledges of the United States by the treaty of 1803, their acts, and the constitution, to neither of which Spain was a party; but as Spain would neither cede nor abandon her claim, without a renewed pledge of nation to nation, in the most solemn of all international acts, the pledge was renewed both to the king, his subjects and grantees; which was additional to all the previous promises and obligations of the United States to protect property, fairly and lawfully acquired, and maintain its free enjoyment.

There is another view in which the treaty of 1819 must be considered, in order to give it its constitutional and intended effect, by operating directly on all the subjects to which it relates, where no future act is stipulated to be done by either party, or the thing stipulated is, in its nature, to be performed in future, as the incorporation of the territory and its inhabitants into the Union, which is necessarily a prospective act. But the cession by the king, and the confirmation of grants, must be taken to be acts done and perfected by force of the treaty itself, and by the terms of the ratification by both parties; for it is difficult to conceive, how every article and clause of the treaty can be ratified and confirmed, "by these presents," or how it can be observed and performed by civil officers and others, if any future act of legislation is necessary to give it validity or effect, by the king, as to the cession, or by the United States, as to the clause of confirmation. If the question was new, it would seem to be settled by the constitution; for if a treaty made under its authority, is a supreme law of the land, it would be a bold proposition, that an act of congress must be first passed, in order to give it effect as such; and equally bold to assert, as the American view of the faith of treaties, by the law of nations, that its stipulations may be performed or not, at the discretion of congress. If, on the principles of the law of nations, or national faith, one treaty should be held more sacred than another, that of 1819 stands in bold relief as a settlement of past controversies, on mutual considerations and stipulations, so dependent on each other, that the non-performance by either party of any part, would necessarily defeat the whole object and effect of the treaty, and renew old disputes. Thus, if the disputed territory and its inhabitants and proprietors, "are excepted places" and "persons;" then there has been no cession to the

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United States by the king, and no confirmation *of his grants stipulated for by the treaty ; both nations stand towards each other on their original right, and the rights of individuals to property remain as if no treaty had been made, and negotiation still continued ; whereas, if the territory west of the Perdido is ceded by the treaty, every clause has full effect. There is a most marked distinction between the two treaties in one respect : by that of 1803, there was an out and out purchase of territory, to which the United States had no claim or pretension ; both parties dealt at arms' length ; there was nothing to compromise, no previous differences to settle ; the subject of the cession was a province owned by France, in the plenitude of sovereignty, in propriety and dominion, in her actual possession, as a government *de facto* and *de jure*, which she ceded to the United States for a specified money consideration. 2 Pet. 303.

Another distinction is equally marked and prominent. In the Louisiana treaty, there is no stipulation by the United States, for the confirmation of grants of any description, previously made by France or Spain ; or any other security promised for private property, than the terms of the cession by the second article imply, by ceding "vacant lands," &c., "which are not private property ;" and the stipulation in the third article, to incorporate the inhabitants in the Union, as soon as possible, &c., and admitted to the enjoyment of the rights of citizens of the United States ; and in the meantime, be protected and maintained in the free enjoyment of their property. 1 Laws U. S. 136. The reason of this distinction is obvious. Though the treaty of 1803 made no provision for a change of government, it was, in the first instance, to be temporary and territorial, under the sole power of congress, in virtue of the third section, fourth article of the constitution ; and afterwards, a state government, subject only to the same powers which congress could exercise in the old states. 1 Pet. 542 ; 9 Ibid. 234, 236. No change of government was contemplated, or could be made by the treaty of 1819, except as to the territory east of the state of Alabama ; as all westward to the Mississippi then formed a part of three states ; and the incorporation thereof, and the inhabitants, into the Union was completely effected (in virtue of the treaty of 1803), two years before the ratification of the Florida treaty. See Pet. 308-9, 311-12. Hence arose the difference between the corresponding articles of the two treaties ; that of 1819, in the sixth article, stipulating only for the incorporation of the inhabitants, &c., and their admission to the rights, &c., of citizens of the United States ; omitting any stipulation as to property, save by the eighth article, which was co-extensive with the whole ceded territory east of the Mississippi, and superseded the necessity of any further stipulation to protect property ; and the constitution placed the government of the territory east of the Perdido in congress, under the general powers conferred by the third section of the fourth article.

From the course of the political departments of the government,
 *390] *I now proceed to that of the judicial department, on this and kindred subjects. 1. As to the treaty of 1803, its construction, and effect on private property in Louisiana. 2. The decisions of this court on claims to land east of the Perdido, under the treaty of 1819. 3. Decisions on claims to land in disputed territory, under that and previous treaties. 4. The decisions on articles of capitulation, and treaties between the United

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States and foreign powers. 5. The decisions on compacts of boundary between state and state, and states with the United States. 6. How far questions of titles to land in a disputed territory are judicial.

On this, as on the former branch of the subject, my object is to show :

1. A perfect coincidence of opinion between all the departments of the government, on the subject of Spanish titles under the two treaties : 2. That if my opinion is at variance with that of this court in 12 Pet. 515, &c., it arises from my entire concurrence with their declaration in that case, that the treaty of 1819 finally settled the long-subsisting controversy between the United States and Spain, about the territory between the Perdido and the Mississippi : 3. That every principle of the case of *Foster v. Neilson*, in 2 Pet. 299, 317, adverse to grants in the disputed territory, has been since overruled : 4. That the principles of that case, which stand affirmed in all subsequent cases, give full validity to such grants : 5. That the case of *Poole v. Fleegeer* has no bearing on the treaty of 1819 : and 6. That any decision of this court adverse to such grant, founded solely on the supposed authority of those two cases, and at variance with a uniform course of adjudication, before and after, may be deemed worthy of reconsideration.

1. In *Soulard v. United States*, this court declared, that the United States, as a just nation, regarded the stipulation of the third article of the Louisiana treaty, for the protection of the property of the inhabitants, "as the avowal of a principle which would have been held equally sacred though it had not been inserted in the contract." 4 Pet. 511 ; s. p. 10 Ibid. 330. "That the term 'property,' as applied to lands, comprehends every species of title, inchoate or complete;" those rights which lie in contract, executory or executed. "In this respect, the relation of the inhabitants to their government is not changed ; the new government takes the place of that which has passed away." 4 Pet. 512. "This is the sentiment by which the government of the United States is animated, and which it has infused into its legislation." Ibid. In alluding to this stipulation, the court say, in *Delassus v. United States*, "that the perfect inviolability of property is among these rights, all will assert and maintain." "The right of property then is protected and secured by this *treaty ; and no principle is [*391 better settled in this country, than that an inchoate title to lands is property." 9 Pet. 133. "Independent of treaty stipulation, this right would be held sacred." "The language of the treaty excludes every idea of interfering with private property ; of transferring lands which had been severed from the royal domain. The people change their sovereign ; their right to property remains unaffected by the change." Ibid.

In the *City of New Orleans v. De Armas*, it was held, that a patent from the United States, pursuant to an act of congress, could not "operate or destroy any previous existing title, vested under the pre-existing government, as a principle applicable to every grant, that it cannot affect pre-existing titles." 9 Pet. 236. In the *United States v. Smith*, it is laid down as a settled principle, by the court, that if the king had, by his own, or the acts of his lawful authorities, become a trustee for the claimant of lands, it amounted to the severance thereof from the royal domains (10 Pet. 331), and that the United States have put themselves in the place of Spain. Ibid. 335. In *New Orleans v. United States*, the effect of the Louisiana treaty was most fully and ably considered by the court, in a unanimous opinion.

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The property in controversy was the quay in front of the city, which was claimed by the city by a dedication thereof to its use by France and by Spain. The United States claimed it as part of the royal domain, and as such ceded to them by the treaty ; on which the court thus speak : "If the common in contest, under the Spanish crown, formed a part of the public domain, or the crown lands, and the king had power to alien it, as other lands, there can be no doubt, that it passed under the treaty to the United States, and they have a right to dispose of it the same as other public lands. But if the king of Spain held the land in trust for the use of the city, or only possessed a limited jurisdiction over it, principally, if not exclusively, for police purposes, was the right passed to the United States under the treaty ?" 10 Pet. 736. This question is answered in the decision of the court, "that, in their opinion, neither the fee of the land in controversy, nor the right to regulate its issue, is vested in the United States." Ibid. 737.

2. As this opinion can neither require or receive any weight by any remarks of mine, I now proceed to notice the adjudications of this court in cases arising under the Florida treaty, in relation to the territory east of the Perdido, including East Florida. The first was the *American Insurance Company v. Canter*, in which the opinion of the court is too important to be referred to otherwise than in their words : "The course which the argument has taken will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States." 1 Pet. 542. "The constitution confers absolutely on the government of the *Union the powers of making war and of making treaties ; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed ; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it ; and the law, which may be denominated political, is necessarily changed ; although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly-created power of the state. On the 2d February 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision : 'The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution ; and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States.' This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire, whether

this is not their condition, independent of stipulation. They do not, however, participate in political power—they do not share in the government, till Florida shall become a state. In the meantime, Florida continues to be a territory of the United States ; governed by virtue of that clause of the constitution which empowers congress to make all needful regulations respecting the territory or other property belonging to the United States. It has been already stated, that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognises this principle, by using the words ‘laws of the territory now in force therein.’ No laws could then be in force but those enacted by the Spanish government.” *Ibid.* 544.

These principles apply to all parts of Florida, as ceded by Spain, under either treaty, and to the disputed territory, as well as other parts of either cession ; the local laws in force at the time the treaties respectively took effect, were the rules of property and right *under both ; and if the treaty of 1819 was the law of the land in 1828, and under the sixth article, the effect of the stipulations was to admit the inhabitants to the enjoyment of the rights, &c., which were promised, by its own force, operating *in presenti* upon the subject ; ingenuity will be pushed to its utmost stretch, to give a different effect to the eighth article. As the words of the court admit of no exception or qualification, that article must operate in like manner to ratify and confirm all the grants to which it relates, in all parts of the ceded territories, whether within the states to which it had been annexed, or that which was east of the Perdido. [*393]

The principles of this opinion also apply with full force to the law of nations, as it bears on the relations between the United States, and the people and proprietors of the disputed territory, consequent upon the treaty of 1803, the military occupation in virtue of the right of the United States, by that cession, from 1810 to 1821 ; as a conquest, by the right of war, or as a new acquisition, by the cession of Spain in 1821, subject to the stipulation it contained. Take it in any way, the law of nations protected all rights of property, from whatever power those rights arose ; and it is not a little remarkable, that every principle of this case was overlooked at the next term, and this treaty declared not to be the law of the land.

Next came the case of *Foster v. Neilson*, in 1829, wherein the majority of the court, against the opinion of the chief justice, and Justice ———, held, that, in relation to the grants referred to in the eighth article of the treaty, it was only a contract on the part of the United States, to ratify and confirm them by an act of congress, which was necessary to execute that part of the treaty ; the opinion of the court taking no notice of the law or usage of nations, or of any former decisions. But the court were unanimous in their opinion, that if the eighth article had declared that all grants, &c., shall be valid to the same extent as if the ceded territories had remained under the dominion of the king, or “that these grants are hereby confirmed, the treaty would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it.” 2 Pet. 314. That if the second article had omitted the words, “which belong to him,” the “United States, by accepting the cession, might have sanctioned the right

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to make the cession, and have been bound to consider the eighth article as co-extensive with the second. The stipulation of the eighth article might have been construed to be an admission that West Florida, to its full extent, was ceded by this treaty." Ibid. 311. "That if the ratification by the king was an exception to the stipulation of the eighth article for confirming grants, the excepted grants would have been withdrawn from the eighth article, by the exception, and would otherwise have been within its provisions." "Consequently, that all other fair grants, within the time specified, were as obligatory on the United States as on his Catholic Majesty." Ibid. 313.

It is evident, therefore, that so far as this case depended on the construction of the treaty, it turned on three positions: 1. Whether the *second
*394] article ceded the whole territory of West Florida. 2. Whether the words of the eighth article operated directly on the grants, so as to confirm them by its own force. 3. Whether the ratification by the king operated as an exception to the eighth article, by excluding the three grants. Now, had the court noticed the third article, in connection with the second, as was done by the king in his ratification, all difficulty respecting the words, "which belong to him," would have been removed; for the king declares that the cession was by both articles. 6 Laws U. S. 628. By the first clause of the third article, "the boundary line between the two countries west of the Mississippi," is the Sabine, to the 32° north latitude, thence north to Red river, &c. By the second clause, the parties agree to cede and renounce all their rights, &c., to the territory described by that line; the United States to all west and south of it; and, "in like manner, his Catholic Majesty cedes to the United States, all his rights, claims and pretensions, to any territories east and north of said line, and for himself, his heirs and successors, renounces all claim to the said territories for ever." Ibid. 616. The words of this clause are broad enough to embrace the whole territory east of the Mississippi; the words "claims" and "pretensions," are peculiarly appropriate to that part which lies west of the Perdido; and, when taken in connection with the second article, divest it of all the doubts, by the use of the words "which belong to him." So that their combined effect is a cession by one party, and an acceptance by the other, of all the rights, claims and pretensions of Spain, to all the territory east of the Sabine, including what was known as East and West Florida, and to which the stipulation of the eighth article would apply, by the opinion of the court.

The second point was decided in the *United States v. Arredondo*, in 1832, in which the court held, "that the United States never seem to have claimed any part of what could be shown by legal evidence and local law, to have been severed from the royal domain, before their right attached" (6 Pet. 717), whether the severance was by "patent, grant, concession, warrant, order of survey, or any other act which might have been perfected into a complete title, by the laws, usages and customs of Spain." Ibid. 721. "If a question arises what lands were ceded (to the United States), the answer is found in the second article—vacant lands; not those which had been individually appropriated, and were not the subjects of a hostile and adversary grant. The renunciation, by the third article, by both parties, was only of their respective rights, claims and pretensions to the territory renounced; neither government had any right to renounce over lands, to

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which a title had been conveyed to their citizens or subjects respectively. Thus deciding on those articles of the treaty, and in conformity to the rules and principles before established, we should be of opinion, that the land embraced in the grant was no longer a part of the royal domain, at the date of the treaty, but private property, land not vacant, *but appropriated [*395 by a prior and valid deed." Ibid. 735-6. "The eighth article was evidently intended for the benefit of those who held grants, and were considered as proprietors of land in Florida; and to give it a construction which would remove and limit rights thus intended to be secured, would deprive them of the benefit of the fair construction of the second and third articles of the treaty, and leave them in a worse situation than if the eighth had been omitted altogether." "The honor of the king was concerned most deeply, in not doing an act which would deprive his subjects of what he had granted to them," &c., "and to not leave the confirmation of grants by lawful authority, at the pleasure of the United States." Before the execution of the treaty, there was inserted a stipulation in "Spanish, by which the ceded territory should pass into the hands of the United States, with the declared instruction by the king of Spain, that the grants referred to operated *in presenti*, as an exception and reservation of lands granted in his name, and by his authority, using words which expressed his intention, in his own language; that the grants were ratified and confirmed in the very act of cession, subject to no future contingency." Ibid. 737.

Such was declared to be its effect, according to the stipulations of the treaty, the law of nations, the acts of congress, and the laws of Spain. "If the title was confirmed presently, the king had, within the bounds of the grant, no right or title to convey, and the United States could receive none. If no future act of theirs was necessary for their confirmation and ratification, the legal title, much less the beneficial interest, never passed to them (the United States). Ibid. 738. On a deliberate construction of that article, the words, "shall be ratified and confirmed," were held to mean "shall remain ratified and confirmed; and that the United States, in accepting the cession, could assert no claim to lands thus expressly excepted;" and the court declared explicitly, that the grants included in the eighth article, and those referred to in the ratification by the king, "were confirmed and annulled respectively, simultaneously with the ratification and confirmation of the treaty, and that when the territory was ceded, the United States had no right in any of the lands embraced in the confirmed grants." Ibid. 741-2.

The same principles were adopted in the *United States v. Percheman*, and in language most emphatic and unequivocal, throughout the opinion delivered by the chief justice. After reciting the first clause of the second article, which ceded the territory in general terms, the court observe: "A cession of territory is never understood to be a cession of the property of the inhabitants." 7 Pet. 87. "The king cedes that only 'which belonged to him;' lands he had previously granted were not his to cede. Neither party could so understand the cession; neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world." The second clause of the second article is thus referred to: "The special enumeration could not have been made, had the first clause of the article been supposed to pass *the objects thus enumerated, [*396 but private property also." 7 Pet. 87. The grant of buildings could

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not have been limited by the words, "which are not private property," had private property been included in the cession of the territory. "This state of things ought to be kept in view, when we construe the eighth article of the treaty, and the acts of congress relating to Spanish titles. This (the eighth) article is apparently introduced on the part of Spain, and must be intended to stipulate expressly, for that security to private property, which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security for them, that its positive words require, would seem to be admissible. Without it, the titles of individuals would be as valid under the new government, as under the old," &c. The court then declare, that this article means, that the grants "shall remain ratified and confirmed to the persons in possession of them, to the same extent, &c. (that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty), thus conforming exactly to the universally received doctrine of the law of nations. If, as we think must be admitted, the security of private property was intended by the parties; if this security would have been complete, without the article, the United States could have no motive for insisting on the interposition of government, in order to give validity to titles, which, according to the usages of the civilized world, were already valid." Ibid. 88-9. The grants are then declared to be ratified and confirmed by the force of the treaty itself, as the proper, if not unavoidable, construction of its words; and the court also declares that this construction would have been given in *Foster v. Neilson*, if the Spanish part of the treaty had been brought to their view; and that "this understanding of the article must enter into our construction of the acts of congress on the subject." Ibid. 89.

These cases finally settled the construction of the second, third and eighth articles of the treaty of 1819; they overruled the construction given in *Foster v. Neilson*, and have remained unquestioned to this time (12 Pet. 519); and "on the fullest consideration (it has been) held, that the treaty operated as a present, perfect and absolute confirmation of all the grants which come within its provisions. That no act of the political department remained to be done; that it was an executed treaty, the law of the land, and a rule for the court; a rule of title and property," &c. Ibid. 747.

In the *United States v. Kingsley*, decided in 1838, the court took broader ground in favor of Spanish titles, than had been assumed in any former case in relation to the construction of the treaty, and expressed their opinion, in language of peculiar force, and with a more appropriate reference to its spirit, meaning and words, than is to be found in any other opinion. "Under the treaty, it is true, that grants of land made before the 24th January 1818, by his Catholic Majesty, or by his lawful authority, stand ratified and *397] confirmed, to the same extent that the same grants would be valid if Florida had remained under the dominion of Spain," &c. "It is admitted, that in the construction of this article of the treaty (the eighth), the United States succeeds to all those equitable obligations, which we are to suppose would have influenced his Catholic Majesty to secure to his subjects their property, and which would have been applied by him in the construction of a conditional grant, to make it absolute. And further, in the construction of this article of the treaty, it must be conceded, that the United States must maintain the rights of property under it, by applying the laws and customs

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by which those rights were secured, before Florida was ceded, or by which an inchoate right of property would, by laws and customs, have been adjudicated by Spanish authority to have become a perfect right, by applying in the first instance in such cases, as was said in *Arredondo's Case*, the principles of justice, according to the rules of equity; and in the second, all those laws and customs decisive of a right of property, while the party claiming the right was a subject of Spain." 12 Pet. 484-5.

This final result of the adjudications of this court settles all doubts as to the extent and effect of the cession and the construction of the treaty, which were expressed by the court in *Foster v. Neilson*, and is decisive of the first two points. Their opinion in the case of the *United States v. Clarke*, in 1834, is equally decisive of the question whether the ratification by the king, in annulling the three grants to Alagon, Punon Rostro and De Vargas, is an exception or proviso to the eighth article; on which subject this is the language of the court, in 8 Pet. 463: "While Florida remained a province of Spain, the right of his Catholic Majesty, acting in person or by his officers, to distribute lands according to his pleasure, was unquestioned. That he was in the constant exercise of this power, was well known. If the United States were not content to receive the territory, charged with titles thus created, they ought to have made, and they would have made, such exceptions as they deemed necessary. They have made these exceptions. They have stipulated that all grants made since the 24th of January 1818, shall be null and void. It is understood, that this stipulation was intended to embrace three large grants made by the king, which comprehended nearly all the crown lands in East Florida. However this may be, it shows that the subject was in the mind of the negotiator; and the apprehended mischief was guarded against, so far as the parties could agree. The American government was content with the security which this stipulation afforded, and cannot now demand further and additional grounds. The acquisition of the Floridas was an object of immense importance to the United States. It was urged by other considerations of a still more powerful operation, in addition to vacant lands. It will be regarded, while our Union lasts, as the highest praise of the administration which made it, and of the negotiator which accomplished it. It cannot be doubted, *that the terms were highly advantageous, and that they were so considered by all. The [*398 United States were satisfied, and had reason to be satisfied, with the provision excluding grants made subsequent to the 24th January 1818, when the fraud on that provision was prevented by the terms of the ratification of the treaty. All other concessions made by his Catholic Majesty, or his lawful authorities, in the ceded territories (in the ratification by the king of Spain, "competent authorities"), are as valid as if the cession has not been made." 8 Pet. 464.

The same principle is recognised and declared in the *United States v. Mitchell*, 9 Pet. 735; and *Strother v. Lucas*, 12 Ibid. 439; in both of which there is a summary review of all the previous decisions of this court on the subject; which are declared, in 9 Pet. 734, "to be definitively settled, so far as the power of this court can do it; and must be taken to be the rules of its judgment."

I content myself with this general reference to these summaries of past decisions, with the exception of the settled meaning of the words "lawful

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authorities," in the eighth article, and "competent authorities," in the ratification by the king; that is, by those persons who exercised the granting power, by authority of the crown. This is the generally received meaning of the words. The treaty recognises the existence of those "lawful authorities," in the ceded territories. 8 Pet. 449. The king "might, therefore, stipulate for that full credence (evidence) to the instrument itself, which is usually allowed to instruments issued by the proper officer." In the sense in which the words "are uniformly used and understood, they mean persons authorized by the crown to grant lands" (8 Pet. 450, 464); the governor or intendant, as the case may be (9 Ibid. 735), "or their deputies." 10 Ibid. 331; s. r. 12 Ibid. 438-9. Had these principles, thus settled in the cases of *Canter*, 1 Ibid. 542; *Soulard*, 4 Ibid. 512; *Arredondo*, 6 Ibid. 717, &c.; *Percheman*, 7 Ibid. 87, &c.; *Clarke*, 8 Ibid. 449, 463; *Delassus*, 9 Ibid. 133; *Mitchel*, Ibid. 734; *New Orleans*, Ibid. 234, and 10 Ibid. 736; *Strother*, 12 Ibid. 435-41; *Kingsley*, Ibid. 464; and *Rhode Island*, Ibid. 747, been recognised in *Foster v. Neilson*, the decision of the court in that case, on their declared principles, must have been in favor of the plaintiff, if he had filed and recorded his claim, according to the requisitions of the acts of congress. As the court decided that case solely on their construction of the treaty, the since established construction, if then adopted, would have made the treaty a rule of decision for the court, have confirmed the grant by its own force, and repealed the 14th section of the act of 1804, and all repugnant laws; and made all grants before January 1818, as obligatory on the United States as they were on Spain, excepting only the three which were cancelled by the ratification of the king. 2 Pet. 311-15.

3. I now proceed to the cases which have arisen in this court, under the treaty of 1819, in relation to grants of land within the disputed territory, made after 1803; and under the kindred treaty *between Georgia *399] and the United States, on grants made by Great Britain and Spain, while those governments occupied the territory in dispute between them (Georgia and the United States).

Harcourt v. Gaillard arose on a grant made by the British governor of West Florida, for land north of the 31° N. lat., and within the charter limits of Georgia; but which was then under the government, and in the possession of Great Britain. The grant was held void, because it was made during the war of the revolution; and the treaty of peace contained no stipulation in favor of grants previously made, nor any cession of territory to the United States; but was an acknowledgment and recognition of their pre-existing rights. But the court also held, that if the grant had been made before the war, "it might have had the benefit of those principles of public law which are applied to territories acquired by conquest;" but the question "is one of disputed boundaries, within which the power which succeeds in war is not obliged to recognise as valid any acts of ownership exercised by his adversary." 12 Wheat. 525. The court then refer to the eighth article of the treaty of Ghent, as an illustration of this doctrine, which is this: "It is agreed, &c., that in case any of the islands, &c., which were in the possession of one of the parties, prior to the commencement of the present war between the two countries, should, &c., fall within the dominions of the other party, all grants of land made previous to the commencement of the war, by the party having had such possession, shall be as

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valid as if such island, &c. had been adjudged to be within the dominions of the party having had such possession," &c. 1 Laws U. S. 699. Whereupon, the court use this language: "And such is unquestionably the law of nations. War is a suit prosecuted by the sword, and when the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails, can only derive validity by treaty stipulation." Ibid. 528.

The next case arose on a grant made by the Spanish government of West Florida, in 1795, before the treaty of limits between Spain and the United States, for land north of the 31° north latitude, of which Spain was in possession at the time of the grant; the court decided this case on the same principles as were adopted in *Poole v. Fleegee*, and applied to the compact between Kentucky and Tennessee. These were the principles laid down in their opinion: "It is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants," &c. "Had Spain considered herself as ceding territory, she would not have neglected a stipulation, which every sentiment of justice and national honor would have demanded, and which the United States would not have refused. But instead of requiring an article to that effect, she has expressly stipulated for the withdrawal of the settlements made within what the treaty admits to be the territory of the United States, and for permission to the settlers to bring their property with them. We think this an unequivocal acknowledgment, that the occupation of that territory by Spain was wrongful; and *we think the opinion thus clearly indicated, [*400 was supported by the state of facts. It follows, that Spanish grants, made after the treaty of peace, can have no intrinsic validity; and the holders must depend for their titles on the laws of the United States." *Henderson v. Poindexter*, 12 Wheat. 535-6. See 11 Pet. 209-10.

The statement of this case by the court, in a preceding part of their opinion, gives a most lucid illustration of the principles above referred to. After alluding to the treaties of peace between Great Britain and the United States, France and Spain, in 1783, the court say, "In the treaty with Spain, the Floridas were ceded to that power, without any description of boundary." "The United States continued to assert a claim to the 31° of north latitude, while Spain maintained perseveringly her pretensions farther north. This was the subject of long and fruitless discussion between the two governments, which was terminated by the treaty, &c., of 27th October 1795, &c. This treaty declares and agrees, that the line which was described in the treaty of peace between Great Britain and the United States, as their south boundary, shall be the line which divides their territory from East and West Florida." "This article does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States," &c., p. 534. This opinion is confirmed by a subsequent part of the same article. That "the settlements of either party in the territory of the other, according to the above-mentioned boundaries, shall be withdrawn within six months after the ratification of this treaty, or sooner, if it be possible; and that they shall be permitted to take with them all the goods and effects which they possess." 12 Wheat. 534-5, 544.

This state of facts in *Harcourt v. Gaillard*, and *Henderson v. Poindexter*,

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shows the grounds on which the British grant, made before the treaty of peace with Great Britain, and the Spanish grant made before the treaty of 1795, with Spain, for lands within the disputed territory, while in the possession of those powers, as governments *de facto*, were held not to be valid under those treaties or the law of nations, to have been exclusively these. The British grant was made *flagrante bello*, the treaty of peace neither ceded or relinquished any territory to the United States, or to particular states; it was a solemn recognition and acknowledgment of their pre-existing rights. The Spanish grant, though made during peace, became void by the admission of Spain, in the treaty of 1795, of the original right of the United States to the territory in which the land was situated; by the express stipulation, that the settlers within the boundary established, should remove, with their effects, within a stipulated time; and that there was no stipulation in the treaty, for the protection of the inhabitants, in the enjoyment of property held under Spanish grants previously made.

*401] There was another feature, common to both cases, which was noticed by the court, growing out of the compact with Georgia, and consequent acts of congress. This compact was made by "article of agreement and cession," entered into the 24th April 1802, "between the United States and the state of Georgia," in virtue of an act of congress, "for an amicable settlement of limits with that state," and a law thereof. By art. 1, "Georgia cedes to the United States all the right, title and claim to the jurisdiction and soil of the lands within her boundary, west of the river Chatahouchee, upon the following express conditions, and subject thereto, that is to say," &c. Secondly, "That all persons who, on the 27th October 1795 (the date of the treaty with Spain), were actual settlers within the territory thus ceded, 'shall be confirmed' in all the grants legally and fully executed, prior to that day, by the former British government of West Florida, or by the government of Spain, and in the claims which may be derived from any actual survey or settlement made under the act of the state of Georgia," &c., passed 7th February 1785. By art. 2, "The United States accepted" this cession, on the conditions therein expressed, and ceded all their right, title and claim to soil and jurisdiction, of any land east of the line of cession, by Georgia to the United States. By art. 3, "The present act of cession and agreement shall be in full force as soon as the legislature of Georgia shall have given its assent to the boundaries of this cession," &c. No law or other act of assent was therefore necessary by the United States, to give it full effect.

In April 1802, Georgia passed an act to ratify and confirm the agreement, which enacted, "that the said deed or articles of agreement and cession be and the same hereby is and are fully, absolutely and amply ratified and confirmed in all its parts; and hereby is and are declared to be binding and conclusive on the said state, her government, and citizens for ever." 1 Laws U. S. 488. The act of congress under which this compact was made, authorized the commissioners appointed by the United States, "to adjust and determine," "all interfering claims of the United States and Georgia, to territory west of the Chatahouchee, north of 31° north latitude, and south of the cession made by South Carolina," &c. 1 Story 494. A subsequent act gave them power, "finally to settle, by compromise," &c., "any claims mentioned in the former act, and on behalf of the United States, to receive

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a cession of any lands therein mentioned, or of the jurisdiction thereof, on such terms as to them shall seem reasonable." Ibid. 779. Subsequent laws provided for carrying this compact into effect. 2 Story, 893, 952, 955.

By now comparing the treaty of 1819, with the treaty of peace with Great Britain, in 1783, it is palpable, that it contains no recognition or acknowledgment of the pre-existing right of the United States to the disputed territory; it, therefore, does not come within the principles [402] which the court applied to the British grant, arising from the nature of that treaty; nor does the principle of the law of nations, in relation to grants made during a war, apply to grants made by Spain, between 1804 and 1810, while in peaceful possession of the territory. A comparison of the two treaties with Spain, places them in more striking contrast in their titles and the stipulations of their respective articles. That of 1795 was declared to be a "treaty of friendship, limits and navigation;" that of 1819, was declared to be a "treaty of amity, settlement and limits." The declared object of the first was "to establish several points, the settlement whereof will be productive of general advantage and reciprocal utility to both nations." See 1 Laws U. S. 262. Its stipulations have been noticed. The declared object of the second was to "settle, terminate and put an end to all their differences and pretensions," so as "to consolidate on a permanent basis," &c.

Art. 5. "The inhabitants of the ceded territories shall be secured in the free exercise of their religion, without any restriction; and all those who may desire to remove to the Spanish dominions, shall be permitted to sell or export their effects, at any time, without being subject in either case to duties."

Art. 6. "They shall be incorporated into the Union," &c.; "and admitted to the enjoyment of all the rights, privileges and immunities of citizens of the United States."

Art. 7. "The officers and troops of his Catholic Majesty," &c., "shall be withdrawn, and possession of the places occupied by them shall be given, within six months after the exchange," &c.

Art. 8. "All grants of lands," &c., "shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if," &c.

This treaty, it must be remembered, had been preceded by the same mutual claims and pretensions of both parties, perseveringly maintained, during long and fruitless discussions between the two governments, as had been the case before the treaty of 1795; and that the possession of the territory was held by the United States, under the most solemn pledges by the president and congress, that it was in their hands, subject to future negotiation, and that the inhabitants should be protected in the enjoyment of their liberty, property and religion.

Now, let this treaty have the benefit of the principles of the law of nations, which were laid down by the court in the two cases in 12 Wheaton, as a treaty of cession, settlement and peace, or as a relinquishment by Spain and purchase by the United States, or as a compact, deed or articles of agreement; let it receive the same construction and effect, as was given to the agreement, or as the court called it, the treaty with Georgia, and then it can be ascertained what would have been the result, had the grants in those cases been protected by any treaty stipulation. Let, also, the acts of

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congress which related to claims under the treaty with Georgia, be compared *403] with those which related to the country west of the *Perdido especially, passed before 1821 ; together with those passed since the treaty was ratified, for the adjustment of titles to land, and the same construction be applied to all, as the court gave to the former ; a satisfactory answer can be given to those questions. 1. Under such a treaty, would private property be protected by the law of nations, if the fifth, sixth and eighth articles had been omitted ? 2. Under the fifth, could the inhabitants who remained in the province, in the enjoyment of their religion, be deprived of their property ? 3. Could those who chose to remove, give a good title to the property which they might choose to sell, whether it was lands or chattels ? 4. Under the sixth, till their incorporation into the Union, can the inhabitants enjoy the rights, privileges and immunities of American citizens, if the United States can confiscate their lands, by declaring their titles void, and granting them to others ; and could this be done, after their incorporation ? 5. Under these, and the eighth article, is it optional with the United States to confirm or confiscate ? 6. Had there been no treaty, would not the grants have been valid, under previous pledges by the United States, and the laws annexing the disputed territory to the adjacent states ? 7. Without a treaty or specific pledge, would not the constitution of the United States protect the inhabitants in their rights of persons and property, by the very act of such annexation, accepted by a state ? 8. Are they not so protected, as the inhabitants of a territory of the United States, under the ordinance of 1787, which was in force in this territory ? 9. Does not the law of nations give to these grants the same protection as in the case of conquest, or military occupation, until congress shall, in virtue of the law of a conqueror, declare them void, and resume the lands ? 10. Can questions arising in cases brought to recover property embraced by such grants, be decided by the courts of the United States, in virtue of the judicial power of the constitution, and 25th section of the judiciary act of 1789, or by special tribunals appointed under the acts of congress, with power to decide on the validity of titles acquired under such grants ?

So far as the solution of these questions depends on the stipulations of the treaty of 1819, and the laws of nations applicable thereto, the principles laid down by the court in *Harcourt v. Gaillard*, and *Henderson v. Poin-dexter*, already quoted, are so full, and so completely answer them, as to save the necessity of repeating them. That treaty presents the reverse of those then under consideration, and the grant, in the present case, is one which must have been then held valid, on every ground assumed by the court in favor of the grants then before them, had they come within the *rules *404] and principles on which the court made the distinctive line between the different kinds of treaties. But when we apply them to the grant in the present case, it is a matter of much surprise, that there could exist a doubt of its validity. Independently of the treaty, it was protected by the law of conquest, military occupation, cession or relinquishment ; independently, too, of any of these considerations, the property of the plaintiff in the land granted, was protected by the acts of the United States, under which their military occupation or acquisition began and was continued. And independently of all other considerations, it was protected by the stipulations of a treaty of cession, amity, settlements and limits, every clause

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whereof was accepted, ratified and confirmed by the treaty-making power of the United States, and proclaimed as binding on them, by its constitutional effect.

At the same term in which *Harcourt v. Gaillard*, and *Henderson v. Poindexter* were decided, the case of *De la Croix v. Chamberlain* came up; the controversy arose on a concession of land in the disputed territory; and as the opinion of the court, taken in connection with the two preceding cases, and the case of *Canter*, 1 Pet. 542, decided at the next term, is of decisive bearing on this case, it is given at large. "The concession referred to in the bill of exceptions, is upon its face, not a grant, nor a survey, but it is, as is expressed in the bill of exceptions, only a warrant or order of survey, authorizing the deputy-surveyor to make a survey, and to report to the intendant the survey, when made, in order to found a grant upon it. The order of survey bears date the — day of — 1806. At that date, the Spanish authorities were in the actual possession of Mobile, where the land lies; and they claimed it as part of the Floridas, then belonging to the Spanish crown. The United States claimed it as part of Louisiana. But it is not necessary to investigate these conflicting claims. The United States have since obtained the Floridas, by purchase and cession from Spain, without having previously settled the controverted boundary between the Floridas as claimed by Spain, and Louisiana as claimed by the United States. A question of disputed boundary between two sovereign, independent nations, is, indeed, much more properly a subject of diplomatic discussion and of treaty, than of judicial investigation. If the United States and Spain had settled their dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary thus fixed would have concluded all parties. But as that was not done, the United States have never, so far as we can discover, distinguished between the concessions of land made by the Spanish authorities, within the disputed territory, while Spain was in the actual possession of it, from concessions of a similar character made by Spain, within the acknowledged limits. We will not, therefore, raise any question upon the ground of any want of authority in the intendant to make the concession. No question of that sort appears to have been made in the court below. *Assuming, then, the authority of the Spanish intendant to make the concession and warrant of survey, the question made and decided in the district court fairly arises: was it a sufficient title to recover upon, in an action of ejectment? If the concession had been made in a country, where, at the time, the principles and practices known to the common law prevailed, it would not bear a contest. It would be regarded, at most, as an incipient inchoate right, but not a perfect legal estate. It would not be such title as would maintain an action of ejectment. Was it a perfect legal estate; was it a title according to the Spanish law which prevailed at Mobile at the time it was made? We apprehend not. It shows upon its face that other acts of sovereignty remained to be done to perfect the title, and which the sovereign power might withhold. A survey was to be made; and according to the laws and usages of Spain, a formal grant was to be made in such cases, to complete the title. It may be admitted, that the United States were bound, in good faith, by the terms of the treaty of cession, by which they acquired the Floridas, to confirm such cessions as had been made by warrants of survey; yet it would not

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follow, that the legal title would be perfected, until confirmation. The government of the United States has throughout acted upon a different principle, in relation to these inchoate rights, in all their acquisitions of territory, whether from Spain or France. Whilst the government has admitted its obligation to confirm such inchoate rights or concessions as had been fairly made, it has maintained, that the legal title has remained in the United States, until by some act of confirmation, it was passed or relinquished to the claimants. It has maintained its right to prescribe the forms and the manner of proceeding, in order to obtain a confirmation, and its right to establish tribunals to investigate and pronounce upon their validity." "This is demonstrated by the laws which congress have repeatedly passed, establishing boards of commissioners to investigate these claims, and to reject or confirm them, or report them to congress in cases of doubt; and by the acts of congress requiring all such claims to be recorded within prescribed periods. It does not appear, that this order of survey has ever been recorded, or passed upon by the board of commissioners, or register of the land-office established by congress in the district in which the land lies. It can, therefore, derive no aid from the laws of the United States." 12 Wheat. 600, 609. In conclusion, the court affirmed the judgment, because an ejectment could not be sustained on the order of survey. Ibid. 603.

But had this been a legal title, complete in form, granting the legal estate, and duly recorded, there could have remained no doubt, that the plaintiff would have recovered, as his case came within every principle of the preceding cases of *Harcourt v. Gaillard*, and *Henderson v. Poindexter*, of which the leading one is this : that "all the acts of congress on the subject of grants within the disputed territory, under the compact with Georgia, *406] pre-suppose the validity of *those which were legally and fully executed before the 25th October 1795." 12 Wheat. 528-9, 536. The articles with Georgia were in themselves a confirmation of titles within its provisions (p. 539), protected by them (p. 540), and confirmed by them. And by the acts of 1819 and 1822, perfect grants were expressly recognised as complete titles.

If these opinions of this court require additional support to entitle them to respect, it will be found in *Keene v. McDonough*; in which, by a decree of a Spanish court, rendered in 1804, at Baton Rouge, which is within the disputed territory, lands were sold and conveyed to the defendant's grantor, who held them under such decree and sale; and this is the language of this court in affirming its validity : "The adjudication having been made by a Spanish tribunal, after the cession of the country to the United States, does not make it void; for we know, historically, that the actual possession of the territory was not surrendered until some time after these proceedings took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, although ceded, was *de facto* in the possession of Spain, and subject to Spanish laws. Such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid. This view of the case supersedes the necessity of considering the question of prescription." 8 Pet. 310.

This Spanish tribunal, it must be remembered, was the governor of the province, acting in his judicial capacity, in which he had power, by the Spanish law, to order a sale of land; which passed the title of the pro-

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prietor to the purchaser, on the execution of a deed, which was deemed the strongest and safest conveyance known to the jurisprudence of Spain. In his political capacity, the same governor had power to dispose of the royal domain, and to make valid grants thereof, which conferred a perfect right of property in the lands so granted. It would, therefore, be a novel principle in American jurisprudence, if, while this governor, by judicial power, could transfer the property of A. to B., he yet could not, by political power, so far dispose of the public domain, as to bind the king, in whose name and by whose authority he acted, as his direct representative ; or even affect his conscience as a trustee, in virtue of the grant to the grantee. And if the king was so bound by a perfect grant, or became a trustee by a mere concession or order of survey, the United States succeeded to the obligation of the king to perfect the title, according to the laws, usages and customs of Spain ; and the grant or concession stood "ratified and confirmed," under the treaty, to the same extent at least, as a judgment did before it. 12 Pet. 484.

The first two of these cases establish these principles : that grants of land in a disputed territory, made by a government in possession thereof, during peace with a nation which is entitled to its dominion and propriety, are valid by the law of nations, without any treaty stipulation ; if made during war, they are not valid, unless protected by *the treaty : [*407 that when territory is acquired by a cession, or relinquishment of one nation to another, or by conquest, the rights of private property are protected by the law of nations, according to the law of the territory, though no stipulation is contained in the act of cession or relinquishment ; and even in case of conquest, no other change is effected, except as to government : and that when a stipulation for property is required, it is never refused ; and when made, is sacredly observed. But when, by a treaty or compact, one nation or state admits the original right of the other to the disputed territory, without any stipulation in favor of the inhabitants, as to lands held by grant under the party which admits the right of the other, the treaty binds their rights, and the grants are not valid against the party whose original right is acknowledged. s. p. 11 Pet. 209-10.

De la Croix v. Chamberlain established the application of the treaty of 1819 to the disputed territory, as a cession thereof by Spain, a purchase by the United States, and a settlement of former controversies concerning it (s. p. 12, 515), that the grants and concessions made by Spain while in possession, are on the same footing as in other parts of Florida ; that the United States are bound in good faith to confirm imperfect titles, and has admitted its obligation to do so, when the inchoate title has been fairly made. And when, in the case of *Canter*, this court declared, that this treaty is the "law of the land" (1 Pet. 542), the omission of any reference to either of these cases in the opinion in *Foster v. Neilson*, shows most clearly that they were not considered by the court ; and when the principles they established are properly considered, it cannot be doubted, that had they been noticed by the majority, the judgment would have been different, for they covered every point in the case. In *Percheman's Case*, the court unanimously assert, that if the Spanish part of the treaty had been within their view in *Foster v. Neilson*, they would have given it the same construction as they afterwards did ; and it is not disrespectful in me to say, that a

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similar result must have followed, if the last four decisions of the court had been under their consideration.

The silence, in the opinion in *Foster v. Neilson*, can, by no just rule, be taken to overrule either of those cases; it lays down no antagonist principle, except that the treaty remained a mere contract till congress executed it by a law; it was as silent on the law of nations, as on former adjudications; yet it will not be pretended, that it was meant to controvert or abrogate those principles which are consecrated by "the usage of the civilized world." 12 Wheat. 535. That opinion admits of no such interpretation, when carefully examined; from 2 Pet. 299-317, it will be found to turn entirely on the since overruled construction of the treaty, and the non-filing of the plaintiff's claim; nor, with that exception, is there a single principle laid down which militates with former decisions in any *respect. And *408] if the since exploded construction of the treaty is stricken from the opinion; and the principles of *Arredondo*, *Percheman*, *Clarke*, and all the subsequent cases are inserted in its place, it will be found that there is not a stronger case in favor of the validity of grants in the disputed territory. The case arose on one of that description; the court tested its validity by the treaty, which they construed in reference to its language alone, as applicable to the whole ceded territory, without adverting to any distinction in its construction, between grants within or without the disputed territory; on the contrary, it was expressly held, that the treaty would apply to a grant west of the *Perdido*, if it was construed as it has been ever since; and that the eighth article would have confirmed even the rejected grants, had they not been excepted by the ratification. 2 Pet. 312-13. When the true construction of the treaty is infused into that opinion, it supports every position on which the plaintiff's title rests; and the doubts which have arisen upon it can be attributed to no other cause, than by misapprehending its principle; or by viewing the overruled construction as restored, without a reference to the ground on which the decision was placed, or appreciating the principles which would have followed; by considering the treaty as self-executed by its own intrinsic force. In which case, the court declared, that the grant would have been valid, within the disputed territory.

It has been supposed, that the opinion in that case went on the ground, that questions of title to lands, arising on Spanish grants in the disputed territory, between 1803 and 1810, were of political and not judicial character; depending on the construction of the Louisiana treaty, as to its eastern boundary. But no such principle is to be found in the opinion: the question of boundary is taken to be settled, and not open to judicial inquiry; yet all other questions affecting the validity of the grant, are throughout considered as open and of judicial cognisance; had boundary and title been considered to be identical, the court would have been saved from the labor which they took, to show that the title was invalid on other grounds; for when the *Perdido* was taken as the true boundary, all grants west of it were consequently void, if title depended on boundary. This is another source of misapprehension of this opinion, which has of late given to it an importance, after it had remained unnoticed in any opinion of the court, after *Percheman's Case*, till 1838.

After the opinion in that case was promulgated, the turning principle of *Foster v. Neilson*, was universally understood to be overruled, and its

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authority ceased to be relied on ; and it was not even quoted by the counsel of the United States in the argument of *Percheman's Case*, though the aid of *Arredondo* was invoked. See 7 Pet. 59, 62. It is not a little strange, that it should now be taken to be a leading case on Spanish titles, when its vital principle is extinguished, *by an unquestioned series of decisions to the contrary, and all the principles which remain unshaken, [*409 are decidedly in favor of a conclusion directly the reverse of that to which the court arrived, on their then erroneous construction of the eighth article, and the ratification of the king. If, then, the case of *Foster v. Neilson* is yet to be considered as a leading or authoritative one, it can be only as to the boundary of Louisiana, which is a *concessum* ; on every other principle of that case, which is not now admitted to be overruled, and to stand overruled, I rely as supporting the plaintiff's title ; and by now infusing into it the universally received and admitted construction of the treaty, consider it as decisive of this case, without the aid of the acts of 1824 or 1836.

It is somewhat remarkable, that there is no one opinion of this court, or any of its members, which even questions any one principle of the law of nations, as laid down in the cases of *Harcourt v. Gaillard*, *Henderson v. Poindexter*, *Insurance Company v. Canter*, *Soulard v. United States*, *Arredondo*, *Percheman*, *Delassus*, *Mitchel*, *Strother v. Lucas*, and *Rhode Island v. Massachusetts* ; in the latter of which these principles are reiterated : " There are two principles of the law of nations. which would protect them (the inhabitants of a disputed territory) in their property. 1. That grants by a government *de facto*, of parts of a disputed territory in its possession, are valid against the state which had the right. 2. That when a territory is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred." 12 Pet. 748-9.

If the reference to *Poole v. Fleegee*, in 12 Pet. 521, is to be considered as questioning any principle of the law of nations, to which the above-named cases refer, it must have arisen from relying on two passages of the opinion in *Poole v. Fleegee*, detached from the context immediately preceding and succeeding them. When the whole opinion in 11 Pet. 209, 211, is taken in connection with the terms of the compact between Kentucky and Tennessee, it will be found, that the case turned on the precise principles of *Harcourt v. Gaillard*, and *Henderson v. Poindexter*, as is abundantly manifest from the turning and decisive point in the case. The circuit court instructed the jury, " that the state of Tennessee, by sanctioning the compact, admitted in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted ; and that, consequently, the titles were subject to the conditions of the compact," which was the ground of the exception and writ of error to this court. After referring to the law of nations and the constitution, the learned judge who delivered the opinion of the court proceeded to assign their reasons.

" The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both states."

*Independently of this broad and general ground, there are other [*410 ingredients in the present case, equally decisive of the merits. Although, in the compact, Walker's line is agreed to be in future the boundary between the two states, it is not so established as having been, for the

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past, the true and rightful boundary ; on the contrary, the compact admits the fact to be the other way. While the compact cedes to Tennessee the jurisdiction up to Walker's line, it cedes to Kentucky all the unappropriated lands north of latitude 36° 30' north. It thus admits, what is in truth undeniable, that the true and legitimate boundary of North Carolina, is in that parallel of latitude, &c. It goes further, and admits that all claims under Virginia to lands north of that boundary shall not be prejudiced by the establishment of Walker's line ; but such claims shall be considered as rightfully entered or granted. The compact then does, by necessary implication, admit, that the boundary between Kentucky and Tennessee is the latitude 36° 30' north, and that Walker's line is to be the true line only for the purpose of future jurisdiction. In this view of the matter, it is perfectly clear, that the grants made by North Carolina and Tennessee were not rightfully made, because they were originally beyond her territorial boundary ; and that the grant under which the claimants claim was rightfully made, because it was within the territorial boundary of Virginia. So that upon this narrower ground, if it were necessary, as we think it is not, to prove the case, it is clear, that the instruction of the court was correct." (See *Robinson v. Campbell*, 3 Wheat. 218-20.) In that case, the compact between Virginia and Tennessee, made in 1802, contained a stipulation in favor of grants by the latter, which were held to be valid ; so that taking the two compacts, and the decisions upon them, they fully illustrate and affirm the principles of the two cessions. 12 Wheat. 525, 535.

It is thus apparent, that an erroneous view has been taken of the principles on which *Poole v. Fleegeer* was decided ; and that when the whole opinion is considered, it does not impugn, but affirms, an established rule, which is an exception to the general principle, that grants of land in a disputed territory, by a government *de facto*, in possession, are valid. The same error appears to have occurred in the view which is taken of the opinion in *Foster v. Neilson*, in the passages extracted from it, in 12 Pet. 517-19, and in the same manner—by not carefully and closely examining the immediate context. Thus, the long extract from 2 Pet. 309, when referred to the preceding sentence, relates solely to "acts of sovereign power," by the United States, before the ratification of the treaty, and to acts done in virtue of the treaty of 1803 alone, and to boundary, as the only political question involved in that case. So, as to the passage extracted in 12 Pet. 518-19, from 2 Ibid. 311, 313. The first, when connected with the context preceding and following it, refers to the second and not the eighth article of the treaty of 1819 ; the other, *when referred, in the same manner, to the preceding context, will be found to be only the conclusion which resulted from the since overruled construction of the eighth article, and ratification of the king.

I trust it will not be deemed improper or disrespectful to have made these remarks in relation to this view of the two cases of *Poole v. Fleegeer* and *Foster v. Neilson*, which have been thus noticed, after the most thorough examination ; the view seems to me to have been a mistaken one, which may well be accounted for by the late period of the term, and the broad field of investigation, which became opened by the course of the argument, and the nature of the case in 12 Pet. 515.

On a comparison of the compact between Tennessee and Kentucky, with

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the treaty of 1819, the contrast between them is striking. By the former, Tennessee admitted, in the most solemn form, the original right of Kentucky; while in the latter, neither party admitted the previous right of the other, but, as held in *Foster v. Neilson*, (2 Pet. 310), each had uniformly and perseveringly insisted on their respective rights. The court also held, that "it is then a fair inference from the language of the treaty, that he (the king) did not mean to retrace his steps, and relinquish his pretensions; but to cede, on a sufficient consideration, all that he claimed as his; and consequently, by the eighth article, to stipulate for the confirmation of all the grants which he had made while the title remained in him." This language requires no comment. The court also held, that the United States did not admit the right of Spain; and add, "It is not improbable, that terms were selected which might not compromise the dignity of either government, and which each might understand consistently with its former pretensions." 2 Pet. 311.

Thus, it appears, that *Foster v. Neilson* presents a decisive answer to any argument founded on *Poole v. Fleeger*, which tends to controvert any one principle of the law of nations, laid down in any opinion of this court, in relation to treaties or compacts between nations or states; and in the whole course of adjudication on these subjects, the court has decided with perfect uniformity and consistency, from 1827 till 1838, on all titles in the various territories acquired by the United States in 1802, 1803 and 1821. In doing so, the court have taken no new ground, but have followed in the old and beaten path, trodden first by the federal court of appeals, in 1781, and pursued by this tribunal from its first organization.

4. In *Miller v. Miller*, the case arose on articles of capitulation, and the court held, that the case must be decided by the resolves and ordinances of congress, when they applied; when they were silent, by the laws, usages and practice of nations; and that a stipulation that the inhabitants shall enjoy all the rights and privileges of subjects of the conquering nation, is a compact which puts them on the same footing as if they had been native subjects, and secures their property from confiscation even by the rights of war. 2 Dall. 1-11. *So, in *Johnson v. McIntosh*, "the rights of [412 the conquered to property should remain unimpaired, and the new subjects should be governed as equitably as the old." 8 Wheat. 589. "When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or be safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes those restraints upon him, and he cannot neglect them, without injury to his fame and hazard to his power." Ibid. 590. "The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true, that the execution of a contract between nations, is to be demanded from, and generally superintended by, the executive of each nation, &c. But where a treaty is the law of the land, and, as such, affects the rights of parties litigant in court, that treaty as much binds their rights, and is as much to be regarded by the court, as an act of congress; and on this principle, it was held, that a stipulation in a treaty that property 'shall be' restored, operated as an immediate restoration, and annulled a judg-

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ment of condemnation previously made." *United States v. The Peggy*, 1 Cranch 109-10.

The fourth article of the treaty of peace with Great Britain, in 1783, stipulated that creditors shall meet with no lawful impediment to the recovery of debts. The sixth article stipulated, that there "shall be" no future confiscations, and that persons in confinement "shall be" immediately set at liberty, and prosecutions commenced be discontinued. The ninth article of the treaty of 1794 stipulated, that British subjects, &c., "shall continue to hold lands," &c. In *Ware v. Hylton*, it was held, that the treaty of peace repealed and nullified all state laws, by its own operation, revived the debt, removed all lawful impediments, and was a supreme law, which overrules all state laws on the subject, to all intents and purposes; and is of equal force and effect as the constitution itself. 3 Dall. 235, 239-40, 281, 284. In *Hopkirk v. Bell*, the treaty was held to repeal the Virginia statute of limitations. 3 Cranch 453, 457. In *Martin v. Hunter*, the treaty of 1794 was held to be the supreme law of the land; that it completely protected and confirmed the title of Fairfax, even admitting that the treaty of peace had left him wholly unprovided for; that as a public law, it was a part of every case before the court, and so completely governed it, that in a case where a treaty was ratified, after the rendition of a judgment in the circuit court, which was impeachable on no other ground than the effect of a treaty, the judgment was reversed on that ground. 7 Cranch 627; s. c. 1 Wheat. 336, 370; s. p. 3 Ibid. 599; 4 Ibid. 462-3, 490.

The treaty of 1778, with France, stipulated that the subjects of France shall not be reputed aliens; and it was held, that it gave *them *413] the right to purchase and hold lands in the United States, and in that respect put them on the precise footing as if they had become citizens. 2 Wheat. 270-277; s. p. 4 Ibid. 464; 7 Ibid. 544; 8 Ibid. 493-4; 10 Ibid. 189; 1 Ibid. 301; 9 Ibid. 496. So, in *The Pizarro*, it was held, that the stipulation in the fifteenth article of the treaty of 1795, with Spain, that free ships "shall make free goods," protected enemies' property as fully as that of a neutral. 2 Wheat. 242.

5. The decisions of this court on compacts of boundary between states, are most peculiarly appropriate to the treaty of 1819, and will now be noticed. *Sims v. Irvine* arose on a compact between Pennsylvania and Virginia, in 1779, which stipulated, "that the private property and rights of all persons, acquired under, founded on, or recognised by, the laws of either country, previous to the date hereof, be saved and confirmed to them, although they should be found to fall within the other; and that in the decisions of disputes thereon, preference shall be given to the elder or prior right, whichever of the said states the prior right shall have been acquired under," &c. (3 Dall. 426), on which the court laid down these principles: The terms therein of reserve and confirmation "of the rights which had been previously acquired under Virginia, in the territory thereby relinquished to Pennsylvania, must, from the nature of the transaction, be expounded favorably for those rights; and so, that a title substantially good, should not, after a change of jurisdiction, be disputed or questioned for formal defects." 3 Dall. 456-7. The case of *Marlatt v. Silk* arose under the same compact; in which the court decided, that a right recognised by Virginia, previous to

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the date of the compact, was secured and confirmed by it (11 Pet. 21); and that questions arising under the compact were not to be decided according to the adjudications of either state, but were "of an international character." Ibid. 22-3.

In *Robinson v. Campbell*, the court construed the compact between Virginia and North Carolina, according to the intention of the parties, as it appeared in the compact, and the laws passed to carry it into effect; and in *Burton v. Williams*, construed the same compact, and an act of congress to give it effect, by the events which led thereto, and the motives of the parties to the compact, which influenced them in making it, and gave the utmost latitude to the act of congress, so as to give effect to the compact, "its provisions and objects." 3 Wheat. 218, 220, 533, 535. *Handly v. Anthony* arose on the cession from Virginia to the United States, as to the boundary on the Ohio. The court decided on it, as it was intended by Virginia when she made the cession; what Virginia had in view in making the deed, according to the great object intended to be effected; and declared, that those principles and considerations which produced the boundary, ought to preserve it. 5 Wheat. 377, 379, 383-4. *Green v. Biddle* arose on the compact between Virginia and *Kentucky, the seventh article of which [*414 stipulated, that all private rights and interests of lands derived from the laws of Virginia, "shall remain valid and secure," under the laws of Kentucky, and "shall be determined," by the laws then existing in Virginia, &c. The court held, that such rights must be exclusively determined by the law of Virginia, and that their security and validity could not be impaired by a law of Kentucky; that the compact intended to preserve all private rights derived from Virginia, as valid under the laws of Kentucky as they were under the then existing laws of Virginia, so as to preserve the beneficial proprietary interest of the rightful owner in the same state in which they were by the laws of Virginia at the time of the separation; and to use all existing remedies which would prevent those rights from being impaired. 8 Wheat. 13, 16, 89, 90, 92. The same principles were re-affirmed in *Hawkins v. Barney*, on the same compact. 5 Pet. 464-5.

In *New Orleans v. United States*, before noticed, the court, in giving effect to the treaty of 1803, decided directly in contradiction to several acts of congress, which were unequivocal in their character, asserting the right of the United States to the land in controversy, and granting parts thereof in fee, notwithstanding the admission of the city authorities of the right of the United States (10 Pet. 735); thus practically adopting the principles laid down in *New Orleans v. De Armas*, in 9 Pet. 234-6; and deciding according to Spanish law. In *Green v. Biddle*, it was held, that by the principles of general law, independent of a compact, the titles to real estate can be determined only by the laws of the state under which they were acquired. Every government has, and from the nature of sovereignty must have, the exclusive right of distribution and grants of the public domain within its boundaries, until it yields it up by compact or conquest. The validity of a title can be judged of by no other rule than those laws, in which it had its origin; and a title, good by those laws, cannot be disregarded but by a departure from the first principles of justice. "If the article, therefore, meant only to provide for the affirmation of that which is the universal rule in the courts of civilized nations, professing to be governed by

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the dictates of law," it was a mere nullity. 8 Wheat. 11-12. The common law was a part of the law of Virginia; and the claimant of land under Virginia had a right to appear in the courts of Kentucky as he might in a Virginia court, if a separation had not taken place; and to demand a trial of his right by the same principles of law which would have governed his case in the courts of the latter state. Ibid. 74-5, 83; s. p. 12 Pet. 484; 1 Ibid. 542, 544.

In *Robinson v. Campbell*, the court decided, that under the compact settling the boundary between Virginia and Tennessee, made in 1802, which contained a clause similar to that in the treaty of Ghent, before recited, "that all claims and titles to land, derived from Virginia, North Carolina *415] or Tennessee, which have fallen into *the respective states, shall remain as secure to the owners thereof as if derived from the government within whose lines they have fallen, and shall not be prejudiced or effected in consequence of the establishment of said line." It gave the same effect and validity to the titles acquired in the disputed territory as they had or would have had in the state by which they were granted, leaving the remedies to enforce such rights to be regulated by the *lex fori*. 3 Wheat. 219-20, &c. By the terms of this compact, it appears, that they are directly the opposite to the compact of 1820, between Tennessee and Kentucky, for while the latter was an unequivocal admission by Tennessee of the original right of Virginia and Kentucky, it not only omitted any stipulation in favor of grants by Tennessee, it admitted the validity of grants by Virginia, in express terms; whereas, in the former, there was a stipulation in favor of the grants of Tennessee which gave them validity.

These two compacts are as distinctive in their character as the two treaties of 1795 and 1819, between Spain and the United States; and this marked distinction, when carried into the opinions of the court, in *Robinson v. Campbell*, and *Poole v. Fleezer*, on the respective compacts; the cases of *Harcourt v. Gaillard*, and *Henderson v. Poindexter*, on the treaties of 1783 and 1795, the cases before recited on the treaties of 1803, 1819, and the several compacts between states, will be found to be clear of all collision with each other, and most conclusive on every point involved in this cause. From 1781 to this time, every treaty, of whatever kind, every compact between state and state, states and the United States, articles of capitulation or even articles of agreement, have been held to effect, by their own force, every stipulation which declares that a thing "shall be" done, or not done; that thenceforth the thing is done, everything that "shall not" be done, if done previously, is repealed and nullified. All treaties, compacts, and articles of agreement in the nature of treaties, to which the United States are parties, have ever been held to be the supreme law of the land, executing themselves by their own *fiat*, having the same effect as an act of congress, and of equal force with the constitution; and if any act is required on the part of the United States, it is to be performed by the executive, and not the legislative power, as declared in the case of *The Peggy*, in 1861; and since affirmed, with the exception of only *Foster v. Neilson*. Whether that case, standing solitary and alone, shall stand in its glory or its ruins, a judicial monument, or a warning beacon, is not dependent on my opinion; my duty is performed by the preceding review of the law of this case in all its various branches, which has led my mind to a conclusion necessarily

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resulting from the established principles of constitutional, national and local law.

6. In ascertaining what are judicial principles and rules of decision, in testing the validity of titles, emanating from the Spanish authorities in the disputed territory, from 1804 till 1810, under the *treaty of 1803 or 1819 ; a general reference to the cases before recited will show, that [*416 with the single exception of a question of disputed boundary, every other question affecting title has been uniformly held to be strictly judicial. In *Hunter v. Martin*, the court established the general principle, that when a case arises under a treaty, the whole title of the parties must be examined and decided by the court, as well on the construction of the treaty and every matter bearing upon it. 1 Wheat. 352-60. In *New Orleans v. De Armas*, it was decided, that under the Louisiana treaty, the inhabitants had a right to have their titles decided by the same tribunals which decide similar rights in other states (9 Pet. 235); and in *New Orleans v. United States*, an illustrious instance is found of the action of the courts of the United States, asserting the supremacy of a treaty, in protecting private property against a series of acts of congress for nearly thirty years. 10 Pet. 734, 736.

When the true construction of the Florida treaty was settled; in the case of *Arredondo*, the court declared, as a consequence thereof : "The proprietors could bring suits to recover them (the lands embraced in the grants confirmed by the treaty), and any question arising would be purely a judicial one." 6 Pet. 741-2. So, in *Percheman's Case*: "Without it (the eighth article), the titles of individuals would remain as valid under the new government as they were under the old ; and those titles, at least, so far as they were consummate, might be asserted in the courts of the United States, independently of this article." 7 Pet. 88. In *De la Croix v. Chamberlain*, the question of boundary was considered to be political in its character, but every other question was treated as judicial. 12 Wheat. 600, 602. So, boundary was held in *Foster v. Neilson*, 2 Pet. 309, to be political. Yet in the same case, the court declared : "Our constitution declares a treaty to be the law of the land ; it is, consequently, to be regarded in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provisions." Ibid. 314.

I presume, it is scarcely necessary to inquire, whether the construction of an act of congress presents a judicial or political question. In *Strother v. Lucas*, the court say, "treaties are the law of the land, and a rule of decision in all courts, their stipulations are binding on the United States ; in that of 1819, there is a present confirmation of all grants made before January 1818, with the exception of only three which had been previously made, and were expressly omitted." 12 Pet. 439. In *Rhode Island v. Massachusetts*, it was held, that "the construction of compacts between states," was a judicial question, and was so considered by this court, in *Sims v. Irvine*, *Marlatt v. Silk*, and *Burton v. Williams*." 12 Pet. 725. And after a review of *Foster*, *Arredondo*, and *Percheman*, it is said, *(" That no act of the political department remained to be done ; that [*417 it (the treaty of 1819) was an executed treaty, the law of the land, and a rule for the court. In the numerous cases which have arisen since, the treaty has been taken to be an executed one, a rule of title and property,

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and all questions arising under it to be judicial." Ibid. 747. The opinion of the chief justice, in this case, is full to the point now considered. "I do not doubt the power of this court to hear and determine a controversy between states, or between individuals, in relation to the boundaries of the states, when the suit is brought to try a right of property in the soil, or any other right which is properly the subject of judicial cognisance and decision, and which depends on the true boundary line." Ibid. 752.

But I do not rest this point on judicial authority, a higher power confers inviolable sanctity on the right of the inhabitants, and proprietors of land in the disputed territory, which this court will never question. The ordinance of 1787 is declared to be a compact between the original states and the people and states in the said territory, and "shall for ever remain inviolable, unless by common consent." 1 Laws U. S. 478. "The inhabitants of the said territory shall always be entitled to the benefits of," &c.; "and of judicial proceedings, according to the course of the common law." Ibid. 479. "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land;" and if the public emergency requires any person's property to be taken, full compensation shall be made for the same. Ibid. The sixth article of the constitution declares, that "all debts contracted, and all engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation." Thus, this ordinance, the most solemn of all engagements, has become a part of the constitution, and is valid to protect and for ever secure the rights of property and judicial proceedings to the inhabitants of every territory to which it applies.

By the acts of congress of 1798 and 1800, the ordinance of 1787 was applied to the territory of Mississippi (1 Story 494, 778); in 1805, to the territory of Orleans (2 Ibid. 963); embracing the whole of the disputed territory. This ordinance, then, is in itself a panoply broad enough to cover every right in controversy in this case, and impenetrable to any assault which can be made upon them by any subordinate power. When this most solemn and mutual compact, this engagement of the old congress, embodied in the constitution itself, shall be finally held to be dependent on an act of the new congress to give it efficiency, there can be no security for property. It must be remembered, too, that in this compact the new states are placed under concomitant obligations to the United States, to purchasers from them, *418] to non-resident proprietors of lands, and the citizens of the United States, which are worthy of consideration. "The legislatures of those districts or new states shall never interfere with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the *bonâ fide* purchasers. No tax shall be imposed on lands, the property of the United States; and in no case shall non-resident proprietors be taxed higher than those residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and for ever free as well to the inhabitants of the said territory as to the citizens of the United States, &c., or those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor." 1 Laws U. S. 479-80. Congress cannot expect that this compact will be held sacred by the new states, if the reciprocal engage-

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ments of the United States cease to be faithfully performed; and it may be found, that the protection and maintenance or the rights of private property in the disputed territory, may conduce more to the honor and interest of the United States than a contrary course, which, in my opinion, will cause "injury to their fame and hazard to their power."

Other considerations arise on a review of the state of things preceding the treaty of 1819, and during the military occupation of this territory by the United States, which deeply concern them in their foreign relations. In 18—, the minister of Great Britain, in behalf of her ally, called upon this government to explain the reason why the United States had incorporated the territory west of the Perdido into the Union, after it had been declared in the president's proclamation that it was still held by the United States as "a subject of fair, friendly negotiation and adjustment (3 State Papers, For. Aff. 400)—a question of sufficient difficulty to answer, when applied to the proclamation alone. But this difficulty would have become the greater, had the confidential message of the president, and the consequent and simultaneous secret resolution and acts of 1811 and 1813 then been publicly disclosed; whereby the law-making, war-making power of the United States, in authorizing the forcible occupation of the territory, by an act of war, had solemnly renewed the pledges of the president, as well in relation to the territorial rights of Spain, as the private property of her grantees. And if, when this fair and friendly negotiation and adjustment was finally closed by the ratification of the treaty in 1821, the United States had announced to Spain, that it did not relate to the territory west of the Perdido; that it belonged to them by the treaty of 1803, and was held solely in virtue thereof; that any cession by the treaty of 1819 was disclaimed, and that the United States disavowed any obligation to confirm any grants of land made by Spain after 1800; *that they remained null and void under the act of 1804, notwithstanding the treaty, till congress should please [*419 to give them validity; that the pledges given by the three departments of the government did not apply to that territory, or its private proprietors; that the ordinance of 1719, the constitution of the United States, the treaty of 1803, or the constitution of the states to which it was annexed, still left private property dependent on the mere will of congress; such declarations would have been met with a new remonstrance, which might have made the United States desirous that its highest judicial tribunal should give to the treaty such a construction as would better comport with the law of nations, the faith of treaties, the injunctions of the constitution, and those principles which had been the standard rules of federal jurisprudence under the confederation, and thence to the present time.

Whatever the acquisition of the Floridas may have cost, in dollars or acres, it was, as this court justly remarked, in 3 Pet. 463, richly repaid by its beneficial consequences, "in addition to vacant lands," of which the United States already possessed some hundreds of millions of acres. Nothing can tend so much to their interest, to preserve their high position at home and abroad, as for the United States to consider this treaty to have consummated all the great objects which it was intended to effect; to extinguish the claim of Spain, by accepting the cession of the territory, charged with all the titles ceded or recognised under Spain, and in all respects redeeming to their full measure every previous pledge given by

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any department of its government: whereby, in the words of the first article, "there shall be a firm and inviolable peace, and sincere friendship, between the United States and their citizens and his Catholic Majesty, his successors and subjects, without exception of person and places;" and in the preamble to the ninth—"with the object of putting an end to all the differences which have existed between them, and of confirming the good understanding which they wish to be for ever maintained between them," &c.

Such is the effect of a treaty of amity, settlement and limits, by the universally received principles of the law of nations; such, too, is the effect of this treaty, according to the most solemn and often repeated adjudications of this court; and such would be its effects, if it had been only an ordinary treaty of cession, or compact of boundary, with similar stipulations for the protection of private property. It requires the application of no new principle, or the liberal expansion of old ones, to take this treaty to so operate, that all land which, by the lawfully recognised authorities of Spain in the province, had been severed from the royal domain, before January 1818, was excepted from the cession to the United States by the second and third articles, and that all grants, &c., remain and stand, under the eighth article, ratified and confirmed, as valid to the same extent as they would have been if the territory had remained under the dominion of Spain.

*420] The ground in controversy was so severed in 1809, by a grant or concession, which, though it may not amount to a complete legal title, yet the United States "were bound in good faith, by the terms of the treaty," to confirm such concessions, and has admitted its obligation to confirm such as had "been fairly made, as was declared in the first case which arose under the treaty, under a concession for land in the disputed territory (12 Wheat. 601); which principle was followed in every subsequent case till 1838, save one; and was fully recognised in *Kingsley's Case*, in the clearest terms: "It is admitted, that in the construction of this article (the eighth) of the treaty, the United States succeeds to all the equitable obligations which we are to suppose would have influenced his Catholic Majesty to secure his subjects their property, and which would have been applied by him in the construction of a conditional grant, to make it absolute." 12 Pet. 484.

These cases alone are full and decisive authority to rule the present, and when taken in connection with all previous decisions, on treaties and compacts of every description, between the United States and foreign nations, or with the states of this Union, or between state and state, making cessions of territory, or adjusting contested boundaries, from 1781 to 1838, their result, when brought to bear on the treaty of 1819, and the plaintiff's title, is decisive.

It has been seen, that *Foster v. Neilson* is a solitary exception from the uniform course of adjudication for fifty-seven years; that the turning point of that case has been, and is yet admitted to remain and stand overruled (12 Pet. 519); and that it can be no authority against the plaintiffs, unless by restoring the overruled construction of the eighth article connected with the ratification, but is conclusive in its favor, when the settled and true construction is infused into that case and the opinion of the court. It has also been seen, that the bearing of the decision in *Poole v. Fleegeer*, on the treaty of 1819, has been entirely misapprehended, by overlooking the obvious and

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settled distinction between treaties and compacts of cession or boundary, which admit the original right of the nation or state to territory, which had before been possessed by another, without any stipulation for the protection of private property ; and those treaties or compacts which contain no such admission, and do contain such stipulations. That distinction cannot be more strongly marked than will be found on a comparison of the compact of 1820, between Kentucky and Tennessee, and the treaty of 1819 ; and when it is carried into all the cases which have ever been before this court, it will be most manifest, that their decisions have been uniformly influenced and governed by it, except in the one case of *Garcia v. Lee*, which admits the application of the treaty to the disputed territory.

If the plaintiff's case stood alone on this treaty, and it continues to be held to execute its own stipulations, without the aid of a law, it overthrows all intervening obstacles to the confirmation of the grant, though the land was within the established boundary of *Louisiana ; even admitting [*421 that, up to 1821, it had remained annulled, under the act of 1804, or any other subsequent law. By the construction now given to that act, it has no bearing on this case, but independent of this construction, and the conclusive reasons assigned by the court, other considerations deprive it of all effect ; for every subsequent act of congress, which protects private property, *pro tanto* repeals it ; so does every other act which places the territory, its inhabitants and proprietors, under the government of the constitution of the United States, or the states which embrace it ; and from whatever source the rights of property arise, they are as sacred under the judicial wing of the Union, or the state, as those of its other citizens. In addition to this protection, the law of nations, without any treaty, stipulation, or constitutional provision, makes private property inviolable, in the cession, relinquishment, conquest, or military occupation of the territory, by some of which means the United States acquired it, and it matters not by which ; the laws, usages and customs of Spain and the province, remained in force as the only rules of title and property, the only test of the validity of grants. In putting themselves in the place of Spain, whether by her consent, or force, the United States took on themselves all the obligations imposed by their position, and the state of the disputed territory, under the treaty of 1805 and subsequent laws, and anew recognised those obligations by the president's proclamation, and the acts of 1811 and 1813 ; the stipulations of the treaty were only an affirmance and renewal of these obligations, in the more solemn form of a national compact most solemnly ratified ; but which bound the United States to nothing to which they were not previously bound, by every guarantee which a government could give to its citizens.

For these reasons, I am clearly of opinion, that without the acts of 1824 or 1836, the plaintiffs' title was as valid as with their aid ; those laws only fulfil previous pledges, and I am unwilling to put my opinion on any grounds which may impair their effect, or which leave it open to the inference, that a right of property under this, or any other grant of land west of the Perdido, requires for its confirmation an act which the United States may do, or not do at their pleasure ; or that any proprietor, who claims by virtue of such grant, has not the same constitutional rights to judicial proceedings as any other citizens of the United States.

With these settled convictions, arising from a full and often renewed

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consideration of the course of the executive, legislative and judicial departments of this government ; I must adhere to the opinion thus expressed, till its errors have been made to appear, by a more correct exposition of the law of nations, the obligations of treaties, and the decisions of this court. I look in vain to the opinion in *Foster v. Neilson*, for light on these subjects, there is a profound silence as to the law of nations, or former adjudications ; the same silence is observed in *Garcia v. Lee*, which rests exclusively on *Foster v. Neilson* ; and *Poole v. Fleegeer*, unless it was intended *to invoke *422] the principles of *Arredondo* and *Percheman*, in support of the judgment then given, which were the only other cases referred to in the opinion, so far from supporting it, are in the most direct hostility to it. The opinion in *Arredondo* was delivered after the appeal by the Spanish minister from the decision in *Foster v. Neilson* ; the opinion in *Percheman* was an answer to the appeal by the secretary of state, from some misapprehensions of the opinion in *Arredondo*. This double appeal was most fully met by the opinion in *Percheman*, in language which vindicated the honor and interest of the United States, and left this court no longer exposed to the imputation of being the only department of the government which presented any obstacle to the execution of the treaty as mutually understood.

To these opinions I must adhere, till their principles have been most deliberately reconsidered, and their fallacy exposed ; if the laws of nations, as there declared, are not correctly stated, there must be some future adjudication by this court, defining them with more accuracy, illustrating them with more truth, and more correctly applying their principles to the treaties of 1803 and 1819.

BARBOUR, Justice. (*Dissenting*.)—I dissent from the opinion just delivered in this case, and will very briefly state the reasons. It is a writ of error to the supreme court of Alabama, affirming the judgment of the circuit court of Baldwin county of that state, in favor of the defendant in error. The error alleged is, that the circuit court, whose judgment was affirmed by the supreme court, misconstrued the act of congress, entitled “an act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city,” passed the 26th May 1824, in the charge which it gave to the jury, at the trial, as stated in the bill of exceptions in the record.

Before I state the charge, it will be necessary, with a view to understand its bearing, to state the material facts appearing in the bill of exceptions to have been proved, and upon which the charge was founded. Pollard's heirs, at the trial, to maintain the issue on their part, gave in evidence a concession for the lot in question, from the Spanish authorities, dated 12th of December 1809, but which had been reported against, and rejected by the commissioners of the United States, appointed to investigate and report upon such claims, because of the want of improvement and occupancy. They then gave in evidence a patent, dated 14th of March 1837, issued by virtue of an act of congress, passed the 2d July 1836, entitled an act for the relief of William Pollard's heirs ; the patent embraced the lot in question. The defendant then gave in evidence, a Spanish grant, dated the 9th of June 1802, to John Forbes & Company, for a lot of ground, eighty feet front, on Royal street, with a depth of three hundred and four feet to the east, and

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bounded on the south by Government *street; which grant was recognised and confirmed by an act of congress.

It was proved, that the lot in question is east of Water street and immediately in front of the lot conveyed by the above-mentioned grant, to John Forbes & Company, and only separated from it by Water street. It was proved, that previously to the year 1819, and until filled up, as hereafter stated, the lot in question was, at ordinary high tide, covered with water, and mainly so, at all stations of the water; that the ordinary high water flowed from the east to about the middle of what is now Water street, between the lot in question, and that embraced in the grant to John Forbes & Company. John Forbes & Company had been in possession of the lot contained in their grant, since the year 1802; and it was known, under the Spanish government, as a water lot; no lots at that time existing between it and the water.

In the year 1823, no one being in possession, and the lot in question being under water, a certain Curtis Lewis, without any title or claim, took possession of it, and filled it up, east of Water street, filling up north of Government street, and at the corner of same and Water street; Lewis remained a few months in possession, when he was ousted by one of the firm of John Forbes & Company, who erected a smith's shop thereon, and they were then turned out by said Lewis, by legal process, who then retained possession until he conveyed it. When Lewis took possession, Water street, at that place, could be passed by carts, and was common. The defendant connected himself, in title, to the lot in question, by means of conveyances, with John Forbes & Company, with Curtis Lewis, and the mayor and aldermen of Mobile. It was admitted, that the lot in question lies between Church street and North Boundary street.

On this state of facts, the court charged the jury, that if the lot conveyed as above to John Forbes & Company, by the deed aforesaid, was known as a water lot, under the Spanish government; and if the lot in question had been improved, at and previous to the 26th of May 1824, and was east of Water street, and immediately in front of the lot so conveyed to John Forbes & Company; then the lot in question passed, by the act of congress of 26th May 1824, to those at that time owing and occupying, so as above conveyed to John Forbes & Company; and that it was immaterial, who made the improvements on the lot on the east side of Water street, being the one in question; that by the aforesaid act of congress, the proprietor of the lot on the west side of Water street, known as above, that is, as a water lot, under the Spanish government, was entitled to the lot on the east side of it.

Whether this charge was correct or not, depends upon the construction of the act of 1824; and I now proceed to show, that it is, as I think, precisely in accordance with the true construction of that act; nay, that it is almost the very echo of it. The second section provides, "that all the right and claim of the United States to so *many of [*424 the lots of ground east of Water street, and between Church street and North Boundary street, now known as water lots, as are situated between the channel of the river, and the front of the lots known under the Spanish government as water lots, in the said city of Mobile, whereon improvements have been made, be and the same are hereby vested in the sev-

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eral proprietors and occupants of each of the lots, heretofore fronting on the river Mobile, except," &c. I will, at present, pause here, and examine the meaning of this section, independently of the exception; I will afterwards examine the operation of that. Now, the questions are, who were the grantees, and what the things granted by this section? And first, who were the grantees? They were the proprietors and occupants of the lots, heretofore fronting on the river Mobile. It appears from the record, that the lots on the western side of Water street, were the lots heretofore fronting on the river Mobile, and that these were known under the Spanish government as water lots. There were no lots, at that time, existing between them and the water. The grantees, then, contemplated by the act of congress, were those persons who owned lots known as water lots under the Spanish government; because those were they which heretofore fronted on the river Mobile; and the record, as I have said, fixes their locality on the western side of Water street.

Next, let us inquire, what were the things granted? These were the lots east of Water street, and between Church and North Boundary streets, now known as water lots, and situated between the channel of the river and the front of the lots, known under the Spanish government as water lots, whereon improvements have been made. It appears, that the lot in question answers this description, as to locality, in every particular; that improvements had been made upon it, and that it was in front of the lot owned by John Forbes & Company, which lay on the western side of Water street, and which originally fronted on Mobile river, reaching to it; and was known under the Spanish government as a water lot. If we now apply the charge of the court to this state of facts, we shall see, that it accords with the language of the law, with extraordinary precision. The jury were told, hypothetically, that if the lot conveyed to John Forbes & Company was known as a water lot, under the Spanish government, which hypothesis is proved to be a fact, by the record; and if the lot in question had been improved, previously to the 25th May 1824, and this fact also clearly appears from the record; and was east of Water street, and immediately in front of the lot of John Forbes & Company, and this fact, too, as clearly appears from the record; then, that the lot in question passed by the act of congress of May 1824, to those at that time owning and occupying the lot conveyed to John Forbes & Company. I repeat, that this charge so fully accords with the law, that it may almost be said to be an echo of its language.

*425] I have said, that "all the facts which were put hypothetically to the jury, were proved by the record; but it was not at all necessary that this should have been done. When we are examining the correctness of a charge given to a jury, that if a given state of facts existed, a particular legal result would follow, we must assume the existence of the facts, because the charge only instructs the jury that such is the law, if the facts exist, of which they are to judge; and if the facts do not exist, then the charge, by its very terms, does not apply.

But the court told the jury, that it was immaterial, by whom the improvements were made. I cannot doubt the correctness of this part of the charge: in this, too, the court echoed the very language of the act of congress, "whereon improvements have been made." Now, as the law itself does not say by whom the improvements have been made, but only

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that they must have been made ; if the court had said, that they must have been made by any particular person, they would have put another condition into the law, and have required what it did not require. It is said, however, that the law could not have contemplated giving to one man the benefit of improvements made by another. If such could even be supposed to be the proper construction, the facts in the record would meet it ; because it appears, that Forbes & Company did make an improvement on the lot in question, as also did Curtis Lewis, under whom the defendant claims. But the law, to my mind, clearly does not contemplate giving the new water lot to a person, because he made improvements on it ; if it had so intended, it would have been so said ; but its purpose and its plain language is, that where the new water lot is improved, it shall pass to the owner of the old water lot. The policy of this is obvious. The old water lot originally went to the water ; the new water lot did not then exist, having since come into existence ; the purpose of the statute was to place the owner of the old water lot in his original position, that of still going to the water, which would be effected by giving him the new water lot, without inquiring by whom it was improved.

But it is supposed, that the claim of Pollard's heirs comes within the benefit of the exception in this section, which, so far as it respects this case, is in these words, "except where the Spanish government has made a new grant or order of survey for the same, during the time at which they had the power to grant the same ; in which case, the right and claim of the United States shall be and is hereby vested in the person to whom such grant or order of survey was made, or in his legal representatives." It will be observed, that this exception only extends to such grants or orders of survey, as were made by the Spanish government when they had power to make the same. The grant from the Spanish government to Pollard, which is supposed to be within the benefit of this exception, bears date in 1809 ; if at that time the Spanish government had not power to make the grant, then the exception, by its very terms, does not embrace the case.

*Now, this court solemnly decided in *Foster v. Neilson*, 2 Pet. 254, [*426 and again in *Garcia v. Lee*, 12 Ibid. 511, that in 1809, the date of Pollard's grant, the Spanish government had not the power to make grants in the territory of which the lot in question was a part ; and that all such as were made after the treaty of St. Ildefonso were void. Consistently with these decisions, I think, that at the date of Pollard's grant, the Spanish government had not the power to make it ; and it follows, that it is not within the benefit of the exception.

Some reliance seemed to be placed upon the proviso to this section, which is in these words : "provided, that nothing in this act contained, shall be construed to affect the claim or claims, if any such there be, of any individual or individuals, or of any body politic or corporate," Now, it is too clear for argument, that this proviso cannot aid the claim of Pollard's heirs, upon the assumption that they claim under the exception ; because the object of the proviso is to guard any possible claim of others against being affected by the grant of congress ; either in the enacting part of the cession, or in the exception. I have not thought it necessary to bring the first section of the act into the argument, because that only gives to the city of Mobile the right and claim of the United States to such lots as were not

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confirmed to individuals, by that or any former act ; and as the second section does confirm the claims to this lot, either, as I think, to the proprietor of the old water lot, in front of which it lies ; or, as is argued, to Pollard's heirs, as holding a Spanish grant, nothing passed to the city of Mobile, whichsoever construction shall prevail ; and I will add, that if anything did pass to the city of Mobile, it appears by the record, that their title or claim was vested in the defendant.

Finally, it was argued, that the title of Pollard's heirs was perfected by the act of congress of July 1836, which confirmed to them the lot in question by metes and bounds ; but the decisive answer to that is, that that act contains a proviso, that it should only operate as a relinquishment, on the part of the United States, of all their right and claim to the lot, and should not interfere with or affect the claim or claims of third persons. Now, if, as I clearly think, the right of the United States had passed by the act of 1824, to the owner of the old water lot, in front of which the one in question lay, then the United States had no right or claim to relinquish by the act of 1836. And the same consequence precisely would follow, if, as the plaintiffs contend, the right of the United States passed to them by virtue of the exception in the act of 1824. So that whatsoever may be the construction of the enacting part of that act, or of the exception, it would equally follow, that there was no claim or title in the United States, which the act of 1836 could operate to convey or relinquish. For these reasons, I am clearly of opinion, that the judgment of the supreme court of Alabama is correct, and ought to be affirmed.

*427] *CATRON, Justice. (*Dissenting*)—The town of Mobile was first settled and governed by France ; and by the treaty of 1763, ceded to Great Britain, and attached to Florida ; by the treaty 1783, Florida was ceded by Great Britain to Spain. Florida proper, previously to the treaty of 1763, extended to the river Perdido, and only included the country east of it ; which river was the boundary between France and Spain, from the first settlement of the country up to 1763. 2 Pet. 300. After 1783, and up to 1800, Spain owned Florida and Louisiana ; that power then retroceded to France, Louisiana, to the same extent it had when France owned it ; that is, all west of the Perdido ; disregarding the fact that Great Britain had attached the country west of the Perdido to Florida, and that for the purposes of government, Spain, after 1783, had continued to recognise and govern, as Florida, all the country east of the Mississippi, north of the Iberville, and south of our boundary or the 31° of latitude. But that the country passed to France as far east as the Perdido, by the treaty of St. Ildefonso of 1800, is the established doctrine of this government, and which is fully recognised by this court. And by the treaty of cession of 1803, the French republic ceded Louisiana to the United States, in full sovereignty, with "all public lots and squares, vacant lands, and all public buildings, fortifications, barracks and other edifices, which are not private property." Owing to the confusion growing out of the circumstance, that Great Britain, after 1763, had attached the country west of the Perdido to Florida, and Spain had, after 1783, treated and governed it as part of Florida ; it was assumed by Spain, that no part of the province passed to France by the treaty of 1800, or to the United States, by the cession of France of 1803.

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And Spain, for some nine years after the cession, continued to hold and govern the country, until we took forcible possession of it.

All title to the vacant lots and squares in the town of Mobile having been vested in France, by the treaty of 1800, and in the United States, by the cession of 1803, no interest in the soil afterwards remained in the king and government of Spain; and all attempts to grant lands by that power were merely void. Such is the settled doctrine of this court, as holden in *Foster v. Neilson*, 2 Peters, and re-affirmed in *Garcia v. Lee*, 12 Ibid. So congress has uniformly, from 1804, regarded our title, and the assumptions of Spain. 2 Pet. 304.

The rapid growth and extensive commerce of the city of Mobile, in 1824, rendered it expedient that the city should improve its facilities in regard to navigation; the bay in its front being shallow, extensive wharves and other improvements were indispensable. To accommodate the city, congress passed an act (ch. 415 of that year), vesting in the mayor and aldermen, and their successors, "for the sole use and benefit of the city, for ever, the Hospital and Bakehouse lots; and also all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by that act, or *any former act of congress, and to which no equitable title [*428 existed in favor of any individual, under that act, or any former act." The grant to extend to all public lots lying in front of the city, and between high-water mark and the channel of the river, and between Church and North Boundary streets. Such is the first section of the act; and if nothing more was found in it, there can be no doubt, the city took the title to the square, a part of which is in controversy; as the only exceptions in favor of outstanding claims are those conferred by acts of congress.

The plaintiffs' claim is founded on a concession made by the Spanish governor of Florida, in 1809; and was a permit to William Pollard, to use and occupy, for the purpose of depositing lumber from his saw-mill, the space between Forbes & Company's canal and the king's wharf. As the concession made in 1809 was wholly void, it is useless to inquire into its character, or the nature of the title intended to be conferred.

But it is insisted, the claim is excepted from the first section of the act of 1824, by the second, which provides, that in case of any lot, &c., where the "Spanish government has made a new grant or order of survey for the same, during the time at which they had the power to grant the same; in which case, the right and claim of the United States shall be and is hereby vested in the person to whom such alienation, grant or order of survey was made, or in his legal representatives." The concession of 1809 was made in the face of the act of 1804, ch. 38, § 14 (2 Story's Laws 939), pronouncing all grants by the Spanish authorities after the cession, void; Spain certainly had no power to make it, and therefore, the act of 1824 does not cover the claim. If it had, a title in fee, by force of that act, would have vested in Pollard's heirs; and the special act of 1836, in their favor, been superfluous. But neither the parties interested, nor congress, seem to have supposed the title confirmed by the act of 1824.

The statute also provides, that where improvements had been made on the new water lots, east of Water street, that then the title should vest in the proprietor of the old water lot opposite, on the west side of said street; and on this provision, the charge of the court below turned; that court hold-

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ing the title to the part of the premises in controversy to have vested in Forbes & Company, because it was improved, at the date of the act of 1824; and that it was immaterial, by whom the improvement had been made. That the improvements referred to by the act must have existed on the new and eastern water lots, is, as I think, free from doubt; but that Forbes & Company could acquire a benefit from the improvement made by Lewis is somewhat doubtful; as, however, no critical construction of the act on this point is called for, none has been made. The act of 1824 passed the title to the property covered by the patent issued by virtue of the act of 1836, unless it was excepted from the first act, and this is the only question in the cause; for as the plaintiff must recover by the strength of his own title, it *is immaterial, whether the city of Mobile, or Forbes & Company, *429] took by the act of 1824. The charge of the court, in substance, held the patent on which the lessors rely to be void. On the admitted facts, I think it clearly was so; and that the reasons for the judgment, if proper on the whole case, are immaterial. Such is the uniform rule in actions of ejectment, where a charge of an inferior court is re-examined on a writ of error.

The defendant, however, shows himself clothed with the titles of the city of Mobile, of Forbes & Company, and of Lewis, on which, the court pronounced him to have the better right; and for the reasons above stated, I think, correctly.

THIS cause came on to be heard, on the transcript of the record from the supreme court of the state of Alabama, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said supreme court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said supreme court, that such further proceedings may be had therein, as to law and justice may appertain.¹

*430]

*UNITED STATES v. SAMUEL R. WOOD.

Criminal law.—Perjury.—Secondary evidence.

The defendant was indicted for perjury, in falsely taking and swearing "the owner's oath, in cases where goods have been actually purchased," as prescribed by the fourth section of the supplementary collection law of the first of March 1823; the perjury was charged to have been committed in April 1837, at the custom-house in New York, on the importation of certain woollen goods, in the ship Sheridan. The indictment charged the defendant with having intentionally suppressed the true cost of the goods, with intent to defraud the United States. 2. Charged the perjury in swearing to the truth of the invoice produced by him at the time of entry of the goods, the invoice being false, &c. It appeared by the evidence, that the goods mentioned in the entry had been bought by the defendant from John Wood, his father, of Saddleworth, England; no witness was produced by the United States, to prove that the value or cost of the goods was greater than that for which they were entered at the custom-house in New York. The evidence of this, offered by the prosecution, was the invoice-book of John Wood, and thirty-five original letters from the defendant to John Wood, between 1834 and 1837, showing a combination between John Wood and the defendant, to defraud the United States, by invoicing and entering goods at less than their actual cost; that this combination comprehended the goods imported in the Sheridan; and that the goods received by that ship

This case was re-affirmed, in Pollard v. Kibbe, 9 How. 471.

had been entered by the defendant, he knowing that they had cost more than the prices at which he had entered them. This evidence was objected to on the part of the defendant, as not competent proof to convict the defendant of the crime of perjury; and that, if an inference of guilt could be derived from such proof, it was an inference from circumstances, not sufficient, as the best legal testimony, to warrant a conviction: *Held*, that in order to a conviction, it was not necessary on the part of the prosecution, to produce a living witness; if the jury should believe, from the written testimony, that the defendant made a false and corrupt oath when he entered the goods.

The cases in which a living witness to the *corpus delicti* of the defendant, in a prosecution for perjury, may be dispensed with, are: all such where a person charged with a perjury by false swearing to a fact, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent: in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant, when he took the oath, the oath only being proved to have been taken: in cases where the party is charged with taking an oath contrary to what he must necessarily have known to be the truth and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it.

The letters of the defendant, showing his knowledge of the actual cost of the goods which had been falsely entered by him, were the best evidence which could be given. This evidence was good, under the general principle, that a man's own acts, conduct and declarations, when voluntary, are always admissible in evidence against him. If the letters of the defendant showed that the invoice-book of the vendor of the goods, containing an invoice of the goods enumerated in the invoice to which the defendant had sworn the owner's oath, in which book the goods were priced higher in the sale of them to the defendant, recognised the book as containing the true invoice; his admission superseded the necessity of other proof to establish the real price given by him for the goods; and the letters and invoice-book, in connection, preponderated against the oath taken by the defendant, making a living witness to the *corpus delicti* charged in the indictment, unnecessary.¹

The rule is, that secondary or inferior shall not be substituted for evidence of a higher nature, which the case admits of; the reason of that rule is, that an attempt to substitute the inferior for the higher, implies that the higher would give a different aspect to the case of the party introducing the lesser; "the ground of the rule is a suspicion of fraud." But before the rule is applied, the nature of the case must be considered, to make a right application of it; and if it shall be seen, that the fact to be proved is an act *of the defendant, which, [§431 from its nature, can be concealed from all others, except him whose co-operation was necessary, before the act could be complete; then the admissions and declarations of the defendant, either in writing, or to others, in relation to the act, become evidence.

CERTIFICATE of Division from the Circuit Court for the Southern District of New York. The defendant was indicted, under the revenue collection laws, for the crime of perjury, alleged in the indictment to have been committed by him, in swearing to the matters required to be stated in the "owner's oath, in cases where goods, wares or merchandise have been actually purchased," prescribed by the fourth section of the act supplementary to, and to amend, an act entitled "an act to regulate the collection of duties on imports and tonnage, passed 2d March 1799, and for other purposes," approved March 21st, 1823; that oath having been taken by him on the 20th day of April 1837, upon the importation of woollen goods received by him, in the ship *Sheridan*, from Liverpool, and entered by him, on the said 20th day of April, as the owner thereof, at the custom-house in the city of New York.

The indictment contained two counts; the first relating to the entry referred to in the oath, and the second, to the invoice produced and exhibited

¹ See *United States v. Mayer*, 1 Deady 127; *United States v. Coons*, 1 Bond 1; *Williams v. Commonwealth*, 51 Penn. St. 501.

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at the time of making the oath, and referred to therein. In each count there were several assignments of perjury ; charging, in substance, that the actual cost of the goods in question was not truly stated in the said entry and invoice ; that the said goods had, in fact, and within the knowledge of the defendant, cost more than the prices stated in the said entry and invoice ; and that, in entering said goods, he had intentionally concealed and suppressed the true cost thereof, with intent to defraud the United States.

In the progress of the trial, it appeared, that the goods in question had been shipped to the defendant by his father, John Wood, of Saddleworth, England, in March 1837 ; and that in the invoice produced by the defendant at the time of the entry, and referred to in the oath, the goods in question were represented to have been bought by the defendant of said John Wood. It also appeared, that for several years before, and for some time after, the importation by the Sheridan, the defendant had been in the habit of receiving woollen goods from his said father, which were entered by the defendant at the custom-house, in the city of New York, upon the oath of defendant, as owner, and upon the production of invoices representing the goods to have been sold to the defendant by the said John Wood. One package out of every invoice of the goods entered by defendant, including the goods in question, had been inspected by the officers of customs ; and all the packages in each invoice had been admitted at the cost prices stated in the invoices, and the duties on such cost price duly paid on the same. It appeared, from *432] the testimony of the inspectors of the customs, *that the packages designated for inspection, according to their examination and judgment, were not valued in the invoices, beyond the actual cost of similar goods imported by other persons.

No witnesses were produced on the part of the prosecution, to testify to the actual cost of the goods in question, at the time and place, when and where they were purchased. But the counsel for the United States, to prove the charge in the indictment, to wit, that the goods in question actually cost, to the knowledge of the defendant, more than the prices stated in the invoice, offered and proved certain documentary evidence, consisting of an invoice-book of the above-named John Wood, and of thirty-five original letters from the defendant, Samuel R. Wood, to the said John Wood, written between April 1834, and December 1837 ; and it was alleged, on the part of the prosecution, that this proof disclosed a combination between Samuel R. Wood and John Wood to defraud the United States, by invoicing and entering the goods shipped, at less than their actual cost ; and also disclosed that this combination extended to the shipment by the Sheridan, and that the goods received by that vessel had cost, as defendant knew when he entered the same, more than the prices stated in the invoice produced, and in the entry made by him.

The counsel for the defendant objected to the competency of such proof, to convict of the crime stated in the indictment ; and insisted, that even if an inference of guilt could be derived from such proof, it was an inference from circumstances, not sufficient, as the best legal testimony, to warrant a conviction. That the legal testimony required to convict of perjury in this case was the testimony of at least one living witness, to disprove the truth of the defendant's oath, as to the actual cost of the goods, at the time and place of exportation. That until such proof was adduced, the documentary

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evidence produced by the counsel of the United States did not constitute the legal evidence upon which the defendant could be convicted of the perjury charged in the indictment. The question being discussed, the judges were divided in opinion on the point: "Whether it was necessary, in order to convict the defendant of the crime charged in the indictment, to produce, on the part of the prosecution, at least one living witness, corroborated by another witness, or by circumstances, to contradict the oath of the defendant." Which point, upon which the disagreement happened, was stated under the direction of the said court, at the request of the counsel for the parties in the cause, and was certified into the supreme court of the United States, pursuant to the act in such case made and provided.

The case was argued by *Gilpin*, Attorney-General, for the United States; and *Marxwell* submitted a printed brief, and points and authorities, for the defendant.

**Gilpin*, for the United States.—This indictment arises under the fourth section of the act of 1st March 1823. (3 U. S. Stat. 730.) That [*433 section provides for two classes of incorporations, those made by the owner and purchaser, resident here, and those coming to a consignee or agent, resident here, the owner being in a foreign country. When the importation is made by the former, he is required to swear that the entry and invoice, which he presents at the custom-house, contain a just and true account of the actual cost; and that the invoice so presented is the only one which he knows or believes to be in existence. Where the importation is made by a mere consignee, who, of course, in such case, cannot know the actual cost, he is required to swear that the entry and invoices contain a just and true valuation. The goods which were the subject of this controversy, were goods alleged by the defendant to have been actually purchased by him; and he swore, therefore, that the sum stated by him was their actual cost and the invoice produced the true and only invoice thereof. What may have been their value, is immaterial. It is not denied, that the oath was taken; and therefore, the only question on the trial was, whether the defendant's statement was true; that is, was the sum he swore to be the true cost, that which he actually paid; and was the invoice he produced the only invoice which he knew or believed to exist?

It was alleged, on behalf of the United States, that the statement sworn to was not true in either particular; and to sustain this allegation, they offered in evidence the original invoice-book of the person in England from whom the defendant made his purchase; and thirty-five original letters of the defendant to that person; all going directly to sustain the truth of the allegation, and to show, by the correspondence between the parties, that the sum stated was not the true cost, nor the invoice produced the true and only invoice. This evidence was objected to, as insufficient, solely on the ground that there was an established rule of law which made it indispensable to produce "at least one living witness, corroborated by another witness, or by circumstances," in order to convict the defendant of perjury.

To no branch of legal science, perhaps, have the principles of a sound philosophy been applied so fully as to evidence; and with justice, because if truth be the great end of moral conduct, our first efforts should be to investigate the surest means of attaining it; and justly too, because everything of

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character depends on what the designated tribunals shall declare to be the truth. Hence, no branch of law rests more on principle than evidence. By it, courts have been governed in their decisions, and it is not too much to say, that if they should find an arbitrary rule existing, which tended to obstruct the development of truth, no antiquity, no precedent, would induce them to adhere to it. If, however, there be one rule of evidence more absolute and controlling than all others (to which all others must yield), it is, *434] *that the best evidence must always be produced; not one sort or another indiscriminately—not parol or documentary—but whatever, in the particular case, is the best.* Suppose, a man to be charged with stating falsely what he said to another; the testimony of those who heard what he did say, would be the best. Suppose him to be charged with stating falsely, what he had written to another; will it be doubted, whether the writing itself, or the testimony of one who had read it, is the best? An arbitrary rule, which should sustain the latter in preference to the former, could not stand the test of judicial wisdom for a moment.

In the present case, the defendant has declared on oath, that he has stated truly the sum he actually paid, and produced the only invoice of these goods that he knew of or believed to exist. What is the best evidence on these points? The seller lives in England; the buyer here; they have numerous transactions; their many payments and shipments are blended in a long and general account. What "living witness" could prove the sum paid for these particular goods, or dissect the account to ascertain it? If he could, would his testimony, in the eye of reason or the law, be the best? Would it be comparable to the letter—the private letter between the parties—which states the sum paid? How could a court, in these circumstances, take the imperfect testimony of the "living witness," under a technical rule, in preference to the incontrovertible written document; how could it reject what is primary and excellent, for what is secondary and inferior?

But there is no such rule; none such is sustained by any authority cited. The cases referred to establish a sound and just principle; that the oath of the defendant must be contradicted by a preponderance of testimony; that one oath against another is insufficient; that there must be evidence more than equivalent to a single oath. To this extent, the general expression used in the cases cited, that "two witnesses are necessary to convict of perjury," was meant to apply. Such facts being usually proved by parol evidence, that charging a person with guilt ought clearly to preponderate. Hence, it was said, there must be one oath to balance, and a second to outweigh that of the defendant. But it was clearly decided, that the outweighing evidence might be made up of circumstances; that admissions in letters, and other written testimony, were as good as a second oath. This is admitted in the present case. Does not this yield the whole principle? Does it not admit, that the rule is not oath against oath; if the written testimony is better than that offered under the oath? In treason, two witnesses to an *overt* act are required; yet written declarations of the defendant himself are held to be stronger than the parol statement of a witness. 2 Stark. 123, 125. Suppose, a defendant in chancery affirms a fact in direct response to the bill (a case in which the same technical rule exists as in that of perjury), would it be tolerated, that he should have the benefit of it, though two, or ten, or fifty of his own letters directly con-

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tradict him? The voluntary confessions and *admissions of a party are regarded as the best possible evidence; is it conceivable, that in a case of perjury, they would, if made in writing, be totally rejected, no matter how clear, repeated and distinct, unless some "living witness" could be found to prove what is thus voluntarily acknowledged? Suppose, this defendant, in an affidavit before some competent tribunal, has stated the actual cost of the goods now in controversy to be twice as much as he has here sworn to; could higher or more satisfactory proof of falsehood be adduced? Yet to such difficulties should we be brought, if we were to set aside the paramount rule, which requires and admits, in all cases, the best evidence; and acknowledge, in those of perjury, an arbitrary one, evidently applicable to particular instances alone.

But to whatever extent the technical rule may have been formerly sustained, it is certainly at variance with later authorities. In the *King v. Dane*, 5 Barn. & Ald. 941, it was held, that a defendant may be convicted of perjury, without any other proof than a contrary deposition of his own; for it was said, when he has asserted and denied the same fact by opposite oaths, the one seems sufficient to disprove the other. So in the *King v. Knill*, Ibid. 229, there was no evidence to sustain the prosecution, except proof of contradictory oaths of the defendant on two occasions; and though it was insisted, that mere proof of a contradictory statement on another occasion was insufficient, without the confirmation of a second witness, yet the court held it to be enough, because the contradiction was by the party himself. In the case of the *King v. Mayhew*, 6 Car. & Payne 315, a letter of the defendant's was held to be good evidence against him; though in that case there was, besides, the oath of a "living witness." These cases establish the point, that the rule is not an arbitrary and unbending one, setting aside the paramount principle which requires the best evidence; but a rule, to be applied merely in those cases where the evidence is equally balanced, not derived from the acts or admissions of the party itself, and depending exclusively on parol testimony.

On these grounds, it is submitted, that the evidence derived from the defendant's letters and invoice-books, was sufficient to warrant his conviction; if they were believed by the jury to establish the facts which they were produced to prove.

Maxwell, for the defendant, in a printed brief.—1. The rule of evidence in perjury is well established. Direct proof of the falsity of the oath by a witness, in addition to the proof of the circumstances affording presumption of guilt, is always required. 1 Roscoe, Crim. Law 28, 685; 1 Phil. Evid. 151; 2 Russell, Crim. Law 479; 3 Stark. Evid. 1144; Arch. Crim. Pl. 157; 2 Hawk. P. C. ch. 46, § 2; 4 Bl. Com. 358. This rule of the common law has been uniformly adopted, as a rule of good sense and of safety. 1 Dev. 263; 6 Cow. 120; 10 Mod. 193; 6 Car. & Payne 315; *1 Nott & McCord 547; 13 Petersd. Abr., tit. Perjury, E.; Dane's Abr. ch. 210, [*436 art. 3, § 4; 16 Vin., Perjury, K. 2. The reason of the rule is stated and proved: 4 Bl. Com. 358; 3 Stark. 1144; 13 Petersd. 226, tit. Perjury, E, note 1. 3. Letters and declarations not on oath, are of no force as proof to convict of perjury, without direct testimony, in the first instance of the falsity of the oath. 6 Car. & Payne 315; *King v. Carr*, Sid. 418, referred

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to in 16 Vin., Perjury, K. Proof. 4. A conviction in this case cannot legally be had upon secondary proof, when positive proof is within the power of the prosecutor. Circumstantial evidence, or the doctrine of presumptive, is never allowed; except from the nature of the case positive proof cannot be had. 3 Bl. Com. 371; 3 Chit. Bl. 291, note. 5. The objection to the legal rule of evidence, is the inconvenience to the district-attorney, in getting the proof required by law. In answer to this the court is referred to 4 Bl. Com. 350.

WAYNE, Justice, delivered the opinion of the court.—This cause has been sent to this court, upon a certificate of division of opinion between the judges of the circuit court for the southern district of New York. The defendant was indicted for perjury, in falsely taking and swearing to the “owners’ oath, in cases where goods have been actually purchased;” as prescribed by the fourth section of the supplementary collection law of the 1st March 1823. (3 U. S. Stat. 730.) The indictment charged the perjury to have been committed on 20th April 1837, at the custom-house, in New York, on the importation of certain woollen goods, in the ship Sheridan, from Liverpool, shipped to the defendant by John Wood, of Saddleworth, England. There were two counts in the indictment. The first count charged the perjury in swearing to the truth of the entry of the goods, and averred that the actual cost of the goods was not truly stated in the entry; that it was known to the defendant that they cost more than was there stated, and that on entering them, he intentionally suppressed the true cost, with intent to defraud the United States. The second count charged the perjury in swearing to the truth of the invoice produced by the defendant at the time of the entry; and contained similar averments as to its falsity and the intention of the defendant.

In the progress of the trial, it appeared in evidence, that the goods in question had been shipped to the defendant, by his father, John Wood, of Saddleworth, England, in March 1837; and that in the invoice produced by the defendant, at the time of entry, and referred to in the oath, the goods in question were represented to have been bought by the defendant of said John Wood. It also appeared, that for several years before, and for some time after the importation by the Sheridan, the defendant had been in the habit of receiving woollen goods from his father, which were *entered
*437] in the custom-house in the city of New York, upon the oath of the defendant, as owner, and upon the production of invoices representing the goods to have been sold to the defendant by the said John Wood. It appeared from the testimony of the inspectors of the customs, that the packages designated for inspection, according to their examination and judgment, were not valued in the invoices beyond the actual value of similar goods imported by other persons. No witnesses were produced on the part of the prosecution, to testify to the actual cost of the goods in question, at the time and place when and where they were purchased. But the counsel for the United States, to prove the charge in the indictment, to wit, that the goods in question actually cost, to the knowledge of the defendant, more than the prices stated in the invoice, offered and proved an invoice-book of John Wood, and thirty-five original letters from the defendant, Samuel R. Wood, to the said John Wood, written between April 1834, and December

1837 ; and it was alleged, on the part of the prosecution, that this proof disclosed a combination between Samuel R. Wood and John Wood, to defraud the United States, by invoicing and entering goods, shipped at less than their actual cost ; and also disclosed, that this combination extended to the shipment by the Sheridan ; and that the goods received by that vessel had cost, as defendant knew, when he entered the same, more than the prices stated in the invoice produced, and in the entry made by him.

The counsel for the defendant objected to the competency of such proof to convict of the crime stated in the indictment ; and insisted, that even if an inference of guilt could be derived from such proof, it was an inference from circumstances, not sufficient, as the best legal testimony, to warrant a conviction. That the legal testimony required to convict of perjury in this case, was the testimony of at least one living witness, to disprove the truth of the defendant's oath as to the actual cost of the goods, at the time and place of exportation. That until such proof was adduced, the documentary evidence produced by the counsel of the United States did not constitute the legal evidence upon which the defendant could be convicted of the perjury, charged in the indictment. The judges were divided in opinion, "whether it was necessary, in order to convict the defendant of the crime charged in the indictment, to produce, on the part of the prosecution, at least one living witness, corroborated by another witness, or by circumstances, to contradict the oath of the defendant ?"

The rule upon which the defendant's counsel relies will be found in most of the elementary writers and digests of the law, very much in the same words. Blackstone in his Commentaries, vol. 4, p. 256, says, "The doctrine of evidence upon pleas of the crown, is in most respects the same as that upon civil actions. There are, however, a few leading points, wherein, by several statutes and resolutions, a *difference is made [438 between civil and criminal cases." Then proceeding to state the differences made by some of the statutes in cases of treason, followed by a general remark or two ; he observes, "but in almost every other accusation, one positive witness is sufficient ;" and afterwards, contesting the general accuracy of Baron Montesquien's reflection upon laws being fatal to liberty, which condemn a man to death in any case upon the deposition of a single witness ; he adds, "in cases of indictment for perjury, this doctrine is better founded, and there our law adopts it, for one witness is not allowed to convict a man indicted for perjury, because then there is only one oath against another." In 16 Vin. K. 328, "Presumption is ever to be made in favor of innocence ; and the oath of the party will have regard paid to it till disproved. Therefore, to convict a man of perjury, probable or credible evidence is not enough ; but it must be strong and clear evidence, and more numerous than the evidence given for the defendant, for else it is only oath against oath. A mistake is not enough to convict a man of perjury ; the oath must not only be false, but wilful and malicious." 10 Mod. 193. In Hawkins' Pleas of the Crown, vol. 2, ch. 46, p. 591, "On an indictment for perjury, the evidence of one witness is not sufficient, because then there would only be one oath against another," citing 10 Mod. 193 ; "to convict a man of perjury, there must be strong and clear evidence, and more numerous than the evidence given for the defendant." "It does not appear to be laid down, that two witnesses are necessary to disprove the facts

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sworn to by the defendant ; nor does that seem to be absolutely requisite. But at least, one witness is not sufficient, and in addition to his testimony, some other independent evidence ought to be adduced."

In Archibald's Criminal Pleading 157, it is said, upon an indictment for perjury, there must be two witnesses ; one alone is not sufficient, because there is in that case only one oath against another. 10 Mod. 193. But if the assignment of perjury be directly proved by one witness, and strong circumstantial evidence be given by another, or be established by written documents, this would perhaps be sufficient ; although it does not appear as yet to have been so decided. *Rez v. Lee*, 2 Russ. Cr. & M. 78. Also, if the perjury consists in the defendant having sworn contrary to what he had before sworn upon the same subject, this is not within the rule mentioned ; for the effect of the defendant's oath in the one case is neutralized by his oath in the other ; and proof by one witness will, therefore, make the evidence preponderate. In 7 Dane's Abr. 83, citing Blackstone, it is said, "It has been decided, that one witness is not allowed to convict a man indicted for perjury, because there is only oath against oath." "On a trial for perjury, the oath will be taken as true, until it can be disproved ; and therefore, the evidence must be strong, clear and more numerous, on the part of the prosecution than that on the defendant's part ; for the law will not permit a man to be convicted of perjury, unless *there are two witnesses *439] at least." For which is cited 1 Bro. C. C. 419 ; Crown C. C. 625-6.

In the second volume of Starkie's Law of Evidence, it is said, "It is a general rule, that the testimony of a single witness is insufficient to warrant a conviction on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict, in a case where there is merely the oath of one man to be weighed against that of another. Nevertheless, it very frequently happens, in particular cases, that the testimony of a single witness preponderates against the limited testimony of many." In part 3, p. 398, the same writer says, "So, in the case of perjury, two witnesses are essential; for otherwise there would be nothing more than the oath of one man against that of another, upon which the jury could not safely convict."

In Russell on Crimes 544, it is said, "the evidence of one witness is not sufficient to convict the defendant, on an indictment for perjury, as in such case there would be only one oath against another." 10 Mod. 193. But Russell gives several exceptions to the application of the rule, resting upon principles clearly covering the conclusion to which the case has come upon the question before it.

In Phillips' Evidence, the rule is also given as it is laid down in other writers ; and the case in 10 Mod. 193, is referred to. It may be found, too, repeated in many of the volumes of the English and American reports, as well as in the case of the *State v. Hayward*, 1 Nott & McCord 546, cited by the defendant's counsel. The cases collected in 13 Petersd. Com. Law, affirm the same rule. It must be conceded, no case has yet occurred in our own, or in the English courts, where a conviction for perjury has been had without a witness speaking to the *corpus delicti* of the defendant, except in a case of contradictory oaths by the same person. But it is exactly in the principle of the exception, which is by every one admitted to be sound law,

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that this court has found its way to the conclusion that cases may occur when the evidence comes so directly from the defendant, that the perjury may be proved without the aid of a living witness.

These citations have been made, with the view of placing the position contended for by the defendant's counsel in its most positive form; and to show that the conclusion to which the court has come, has not been without a due consideration of the rule. It is said to be an inflexible rule of the common law, applicable to every charge of perjury; that it cannot be changed but by the legislative power; that until some statutory change is made, courts must enforce it; that though other kind of evidence, and that relied upon by the prosecution in this case, may establish a case of false swearing, it will not suffice to convict for perjury; in short, that a living witness is in every case indispensable.

We do not think any change in the rule necessary. The question is, when and how the rule is to be applied, that it may not, from a *technical interpretation, or positive undeviating adherence to words, [*440 exclude all other testimony as strong and conclusive as that which the rule requires. It is a right rule, founded upon that principle of natural justice, which will not permit one of two persons, both speaking under the sanction of an oath, and, presumptively, entitled to the same credit, to convict the other of false swearing, particularly when punishment is to follow.

But in what cases is the rule to be applied? To all, where to prove the perjury assigned, oral testimony is exclusively relied upon? Then oath against oath proves nothing, except that one of the parties has sworn falsely as to the fact to which they have sworn differently. There must then be two witnesses, or one witness corroborated by circumstances, proved by independent testimony. If we will but recognise the principle upon which circumstances, in the case of one witness, are allowed to have any weight, that principle will carry us out to the conclusion, that circumstances, without any witness, when they exist in documentary or written testimony, may combine to establish the charge of perjury; as they may combine, altogether unaided by oral proof, except the proof of their authenticity, to prove any other fact connected with the declarations of persons, or business of human life. That principle is, that circumstances necessarily make up a part of the proofs of human transactions; that such as have been reduced to writing in unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence *aliunde*; and that such as have been reduced to writing, whether they relate to the declarations or conduct of men, can only be proved by oral testimony.

If it be true, then (and it is so), that the rule of a single witness being insufficient to prove perjury, rests upon the law of a presumptive equality of credit between persons, or upon what Starkie terms, the apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another; satisfy the equal claim to belief, or remove the apprehension, by concurring written proofs, which existed, and are proved to have been in the knowledge of the person charged with the perjury, when it was committed, especially, if such written proofs came from himself, and are facts which he must have known, because they were his own acts; and the reason for the rule ceases. It can only, then, be an arbitrary and peremptory rule; as Starkie says it is, when it is

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applied to cases in which oral testimony is exclusively relied upon to prove perjury. And such, we will perceive to have been the apprehension of this rule; and if we will scrutinize its chronology, we cannot fail to see how truth has grown, as cases have occurred for its application.

At first, two witnesses were required to convict in a case of perjury; both swearing directly adversely from the defendant's oath. Contemporaneously with this requisition, the larger number of witnesses on one side *441] or the other prevailed. Then, a single witness *corroborated by other witnesses, swearing to circumstances bearing directly upon the imputed *corpus delicti* of a defendant, was deemed sufficient. Next, as in the case of *Rex v. Knill*, 5 B. & Ald. 929 note (with a long interval between it and the preceding); a witness who gave proof only of the contradictory oaths of the defendant on two occasions, one being an examination before the house of lords, and the other an examination before the house of commons, was held to be sufficient. Though this principle has been acted on as early as 1764, by Justice YATES, as may be seen in the note to the case of the *King v. Harris*, 5 B. & Ald. 926, and was acquiesced in by Lord MANSFIELD, and Justices WILMOT and ASTON. We are aware, that in a note to *Rex v. Mayhew*, 6 Car. & Payne 315, a doubt is implied concerning the case decided by Justice YATES; but it has the stamp of authenticity, from its having been referred to in a case happening ten years afterwards, before Justice CHAMBRÉ, as will appear by the note in 6 B. & Ald. 937. Afterwards, a single witness, with the defendant's bill of costs (not sworn to), in lieu of a second witness, delivered by the defendant to the prosecutor, was held sufficient to contradict his oath; and in that case, Lord DENMAN says, "a letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness." 6 Car. & Payne 315. All of the foregoing modifications of the rule, will be found in 2 Russell 544, and that respecting written documents is stated in Archbold 157, in anticipation of the case in 6 Car. & Payne 315.

We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule. In what cases, then, will the rule not apply? Or in what cases may a living witness to the *corpus delicti* of a defendant, be dispensed with, and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the prejury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to; or by other written testimony, existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it.

Let us suppose a case or two, in illustration of the positions just laid down. A defendant, in two answers to a bill in equity, swears unequivocally to a fact, and as positively against it. A document is produced,

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executed by himself, decisive of the truth of the fact. In *such a case, can a living witness be wanted; or could any number of living witnesses prove, more certainly, the false swearing, than it would be proved by the document and the defendant's contradictory oaths? Or, take the case of defendant being sued in equity, to recover from him the contents of a lost bond. In answer to a call upon him to say whether he had or had not made such a bond, he swears that he never had made such a bond. The bond is afterwards found and proved; is not his answer, then, upon oath, disproved by a circumstance, stronger than words can be, coming from the mouth of man? Again, suppose a person, in order to obtain a right under a statute, is required to take an oath to a fact which is the mutual act of himself and another, and which from its nature is unequivocal. He swears contrary to the fact. Subsequently, his letters, written before and after his oath, are found; which disclose not only the real fact, but a general design to misrepresent facts of the same kind, and a book or other written paper is produced, bearing directly upon the fact, from its being the original of the transaction, reduced to writing contemporaneously with its occurrence, and recognised by the defendant to be such, though it is in the handwriting of another; will not the defendant's recognition of it, with the auxiliary evidence of the letters, without a living witness to speak directly to the *corpus delicti* of the defendant, justify the whole being put before a jury, in a case of perjury; for them to decide whether the defendant has sworn falsely and corruptly? In such a case, if the person was called in whose handwriting the book or other written paper was, it might happen, that he had only been the recorder of the transaction, at the instigation of one of the parties to it, without his ever having had any communication with the other respecting its contents. The witness then would only prove so much, without proving anything which bore upon the charge of false swearing. But when the defendant himself has recognised the book or writing as evidence of his act (and such recognition is proved), there is no rule of evidence which requires other proof, beyond his admission, to prove the contents of the book or paper to be true. But suppose, the book or written paper to be also in the handwriting of the defendant, and that several of his letters confirm the fact, that he has sworn contrary to the contents of the first (as all the evidence comes from himself), we cannot doubt, it would be right to place the whole before a jury, for it to judge what was the truth of the fact, and whether the defendant had sworn falsely and corruptly.

We will now proceed to examine the case before us, to see if it fall within the principles and illustrations we have given. The defendant is indicted, under the act of congress of 1st March 1823 (U. S. Stat. 730), for falsely and corruptly taking the owners' oath, in cases where goods have been actually purchased. It must be kept in mind, that this oath can only be taken in cases of goods imported from foreign countries. It places the importer, then, in a *condition to commit fraud in the misrepresentation of the price he has given for goods; with only an accidental [*443 possibility on the part of the United States, ever being able to detect it by the evidence of the person from whom the importer has made the purchase. The importer is required to swear that the invoice produced by him, contains a just and faithful account of the actual cost of the goods; and that

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he has not, in the invoice, concealed or suppressed anything, whereby the United States may be defrauded of any part of the duties lawfully due on the goods, &c. The oath does not require from the owner the value of the goods, but the cost to him. There is nothing in it relating to the quality of the goods, but simply the cost or price paid by the importer, as owner. The defendant in his entry did it, upon an invoice sworn to by him, to contain a just and faithful account of the actual cost; that there was nothing in it concealed or suppressed. He is charged with having sworn falsely in respect to the cost of the goods contained in the invoice, by which he made his entry of them. To maintain the charge, the United States must prove that he paid a larger price. The best evidence, it is admitted, must be introduced to establish that fact. What is the best evidence in respect to its quality, as distinguished from quantity or measure; it being in the former sense that the best evidence is required? It is, that secondary or inferior evidence shall not be substituted for evidence of a higher nature, which the case admits of. The reason of the rule is, that an attempt to substitute the inferior for the higher, implies that the higher would give a different aspect to the case of the party introducing the lesser. 1 Russell 437. "The ground of the rule is a suspicion of fraud." But before the rule is applied, the nature of the case must be considered, to make a right application of it; and if it shall be seen, that the fact to be proved is an act of the defendant, which, from its nature, can be concealed from all others except him whose co-operation was necessary before the act could be complete, then the admissions and declarations by the defendant, either in writing or to others, in relation to the act, become evidence. It is no longer a question of the quality but of the quantity of evidence, when it is said, as it is in this case, that his associate in the transaction should be introduced. For instance, we will suppose, that the letters of the defendant in this case speak of the cost of the goods in the invoice, to which the defendant swore, and that they show the goods did cost more than they are rated at in the invoice; the quality of the evidence is of that character that it cannot be inferred that superior evidence exists, to make that fact uncertain. Unless such inference can be made, the evidence offered is the best evidence which the nature of the case admits. The evidence is good, under the general principle, that a man's own acts, conduct and declarations, where voluntary, are always admissible in evidence against him.

So, in respect to the invoice-book of John Wood, containing an invoice *444] of the goods enumerated in the invoice, to which the defendant swore the owner's oath; in the first of which, the goods are priced higher in the sale of them to the defendant. If the letters show the book to have been recognised by the defendant as containing the true invoice, his admission supersedes the necessity of other proof to establish the real price given by him for the goods; and the letters and invoice-book, in connection, preponderate against the oath taken by the defendant, making a living witness to the *corpus delicti* charged in the indictment, unnecessary. All has been done in the case that can be done to intercept such evidence as would tend to prejudice or mislead; and the case must then be confided to the good sense and integrity of the jury, to determine upon the sufficiency of the evidence to convict: the court charging the jury, that the evidence offered is

of that character which supersedes the necessity of introducing a living witness to prove the perjury charged in the indictment.

Let it then be certified to the court below, as the opinion of this court, that in order to convict the defendant of the crime charged in the indictment, it is not necessary on the part of the prosecution to produce a living witness; if the jury shall believe the evidence from the written testimony, sufficient to establish the charge that the defendant made a false and corrupt oath as to the cost of the goods imported in the Sheridan, enumerated in the invoice, upon which the defendant made an entry, taking the owners' oath at the custom-house.

THOMPSON, Justice. (*Dissenting.*)—The question certified in the record is, whether it was necessary, in order to convict the defendant of perjury, to produce, on the part of the prosecution, at least one living witness, corroborated by another witness, or by circumstances, to contradict the oath of the defendant. The rule, as we find it laid down in the elementary books on this subject, is, that to convict a party of the crime of perjury, two witnesses are necessary to contradict him as to the fact upon which the perjury is assigned: and the reason assigned for the rule is, that if one witness only is produced, there will only be one oath against another. This rule, however, in the early adjudged cases, was so modified as to require but one living witness, corroborated by circumstances, to contradict the oath of the defendant; and with this modification, the rule has remained until the present day.

In the present case, the fact on which the perjury was assigned related to the actual cost of the goods, at the time and place of exportation. This was a simple question of fact, susceptible of proof by witnesses, like any other matter of fact. There was nothing, therefore, growing out of the nature of the inquiry, that rendered the proof by witnesses impossible, so as to take the case out of the rules of evidence, in relation to the crime of perjury. No living witness was produced to contradict the oath of the defendant at the custom-house, as to the original cost of the goods. His letters and *certain invoice-books were produced, to sustain the indictment; and these might have been sufficient to warrant the jury in con- [*445] victing the defendant, if such evidence is sufficient to convict a party of the crime of perjury, without the production of at least one living witness. It is, as has been already mentioned, laid down in the books, as a technical rule, in perjury, that there must be at least one witness and corroborating circumstances, to convict of this crime; that there must be oath against oath, as to the *corpus delicti*.

When the books speak of a witness, they always mean oral testimony. It would hardly be considered as correct legal language, to call a letter of the defendant, a witness against him. It was evidence, but not evidence by a witness. The rule, as originally laid down in the elementary treatises on evidence, requiring two witnesses to contradict the party on the matter assigned as perjury, was so modified or relaxed as not to require two witnesses to disprove the facts sworn to by the defendant. But if any material circumstances are proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction. And in England, one case occurred, as reported in a note

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in 7 Eng. Com. Law 306, where the evidence consisted of the contradictory oaths of the party accused, upon the same matter of fact in which the perjury was assigned. It was held, that in such case there was oath against oath, and the perjury might be assigned upon either; and that it might be left to the jury to judge of the motive. The authority of this case, however, has been very much doubted. But the present case does not come within that rule, even if we are disposed to follow the English courts on that subject; for the letters of the defendant cannot certainly be said to be evidence under oath, so as to charge him with contradictory oaths on the fact assigned as perjury. Rules of evidence are rules of law, applicable to the rights of persons as well as the rights of property; and parties are entitled to have their rights tested and decided by such rules, as much in one case as the other. This rule, however, in perjury, being a technical one, may, in many cases, be difficult, if not impracticable, to be carried into execution. If it falls within the proper province of the court entirely to dispense with the rule, and put the evidence in perjury upon the same footing as other criminal offences, I should not be disposed to dissent from it; if, as a new rule, it was made to operate prospectively. But if it is intended to affirm the doctrine urged at the bar, that no such rule of evidence ever existed, as to require, in the case of perjury, at least one living witness, and circumstances in corroboration of his oath, in contradiction to the party charged upon the matter assigned as the perjury; it would, in my judgment, be at variance with a rule universally laid down in all the elementary treatises on the subject of evidence; and as yet never dispensed with, or ever called in question in any adjudication that has fallen under my notice. And that this rule still exists in the English courts, is shown by the late case of **Rex v. Mayhew*, 6 Car. & Payne 315, decided in the *446] year 1834. The perjury in that case was alleged to have been committed by the defendant (who was an attorney), in an affidavit made by him, to oppose a motion made in the court of chancery on behalf of the prosecutor, to refer the defendant's bills of costs for taxation. To prove the perjury, one witness was called: and in lieu of a second witness, it was proposed to put in the defendant's bill of costs, delivered by him to the prosecutor. It was objected, that this was not sufficient, as the bills had not been delivered by the defendant on oath. But DENMAN, Chief Justice, said, "I have not quite made up my mind, that the bill delivered by the defendant is sufficient evidence, or that even a letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness." There was no intimation here, that a letter, or any numbers of letters, from the defendant, contradicting his statement under oath, would dispense with the technical rule in perjury, requiring at least one witness, and corroborating circumstances. The question was, as to what circumstances or evidence would dispense with a second witness.

In the present case, it may be difficult, and perhaps impracticable, to procure any living witness to contradict the oath of the defendant. But it is more congenial with the humane principles of our criminal law, that a guilty man should escape, than to convict him upon evidence heretofore considered as insufficient, according to what is admitted to have been the settled rule of law. Answering the question put in the record in the negative, is abolishing that rule, and introducing one entirely new; and putting the crime of

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perjury on the same footing as any other criminal offence, with respect to the evidence necessary to convict the accused. If there are any great public considerations calling for such an innovation upon the rule of evidence, in cases like the present, let it be altered by the proper tribunal, and under the general rules of evidence applicable to other criminal cases. The evidence derived from the letters of the defendant, is, perhaps, the best evidence the nature of the case will admit of. But it is an entire misapplication of this general rule to the present case, if there is a special and technical rule in the case of perjury, that there must be at least one living witness, and corroborating circumstances, to convict of that crime. I do not feel myself authorized to dispense with what I understand to be admitted, the heretofore settled rule of evidence, which I consider a rule of law, in the case of perjury; and to apply this new rule to the present case by giving it a retrospective operation.

I am accordingly of opinion, that the question put in the record, ought to be answered in the affirmative.

*THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the point and question on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such cases made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that in order to convict the defendant of the crime charged in the indictment, it is not necessary on the part of the prosecution, to produce a living witness, if the jury shall believe the evidence, from the written testimony, sufficient to establish the charge, that the defendant made a false and corrupt oath, as to the cost of the goods imported in the Sheridan, enumerated in the invoice upon which the defendant made an entry by taking the owners' oath at the custom-house. Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court accordingly

Note.—1 Roscoe's *Crim. Law*, 28, 685; 1 *Phil. Evid.* 151; 2 *Russ. Crim. Law* 479; 3 *Stark. Evid.* 1144; *Arch. Crim. Plead.* 157; 2 *Hawk. Pl. C. ch.* 46, § 2; 4 *Bl. Com.* 358; 10 *Mod.* 193; 6 *Cow.* 120; 6 *Car. & Payne* 315; 7 *Eng. Com. Law* 306 and notes; 25 *Ibid.* 415; 13 *Petersdorff, Abr. tit. Perjury, E*; *Dane's Abr. ch.* 210, art. 3, § 4; *Sid.* 418, cited, 16 *Vin. Perjury, K.*; 1 *Nott & McCord*, 547.

*The PHILADELPHIA AND TRENTON RAILROAD Co., Plaintiffs in error,
v. JAMES STIMPSON, Defendant in error.

Patent-law.—Presumption.—Examination of witnesses.—Parol evidence.—Declarations of parties.—Matters of practice.

Action for the violation of a patent-right, granted to the patentee, for "a new and useful improvement in turning short curves on railroads." On the 26th September 1835, a second patent was granted, the original patent, granted in 1831, having been surrendered and cancelled, on account of a defective specification; the second patent being for fourteen years from the date of the original patent; the second patent was in the precise form of the original, except the recital of the fact, that the former patent was cancelled "on account of a defective specification," and the statement of the time the second patent was to begin to run. It was objected, that the second patent should not be admitted in evidence, on the trial of the case, because it did not contain any recitals that the pre-requisites of the act of congress of 1836, authorizing the renewal of patents, had been complied with: *Held*, that this objection could not, in point of law, be maintained. The patent was issued under the great seal of the United States, signed by the president, and countersigned by the secretary of state; it is a presumption of law, that all public officers, and especially such high functionaries, perform their proper official duties, until the contrary is proved. Where an act is to be done, or patent granted, upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act, in granting the patent, is *prima facie* evidence that the proofs have been regularly made, and were satisfactory; no other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, when the law has made the officer the proper judge of their sufficiency and competency.¹

Patents for lands, equally with patents for inventions, have, in courts of justice, been deemed *prima facie* evidence that they have been regularly granted, whenever they have been produced under the great seal of the government, without any recitals or proofs that the pre-requisites of the acts under which they have been issued have been duly observed. In cases of patents, the United States have gone one step farther; and as the patentee is required to make oath that he is the true inventor, before he can obtain a patent, the patent has been deemed *prima facie* evidence that he has made the invention.²

¹ A patentee is not entitled to a re-issue, unless he shows by satisfactory evidence, that the alleged error was owing to "inadvertence, accident or mistake;" and states particularly wherein the inadvertence, accident or mistake consisted; this is the rule of the patent-office and of the court, on appeal from the decision of the commissioner. *Conklin v. Stafford*, 5 Pat. Off. Gaz. 235. But the fact of the granting of the re-issue closes all inquiry into the existence of inadvertence, accident or mistake, and leaves open only the question of fraud for the jury. *Stimpson v. West Chester Railroad Co.*, 4 How. 380. s. p. *Woodworth v. Stone*, 3 Story 749; *Allen v. Sprague*, 1 Bl. C. C. 567; *Forbes v. Barstow Stove Co.*, 2 Cliff. 379; *French v. Rogers*, 1 Fish. 133; *Potter v. Holland*, Id. 382; *Goodyear v. Providence Rubber Co.*, 2 Cliff. 351; s. c., 9 Wall. 797; *Hoffheins v. Brandt*, 2 Fish. 218; *Knight v. Baltimore and Ohio Railroad Co.*, Taney Dec. 106. In a suit for infringement, the commissioner's decision is final and conclusive, unless it is apparent upon the face of the patent, that he has exceeded his authority, that there is such a repugnancy between the old and the new patent, that it

must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original one. *Seymour v. Osborne*, 11 Wall. 543. And see *Batten v. Taggart*, 17 How. 83; *O'Reilly v. Morse*, 15 Id. 111-12; *Sickles v. Evans*, 2 Cliff. 222; *Middleton Tool Co. v. Judd*, 3 Fish. 141; *Potter v. Holland*, 4 Bl. C. C. 238.

² A patent is *prima facie* evidence that the patentee is the inventor of the improvement described, and casts on persons infringing it, the burden of proving that such improvement was not the invention of the patentee, or that it was in public use before he applied for a patent. *Knight v. Baltimore and Ohio Railroad Co.*, Taney Dec. 106; *Mitchell v. Tilghman*, 19 Wall. 395; *Potter v. Holland*, 4 Bl. C. C. 238; *Tompkins v. Gage*, 5 Id. 268; *Taylor v. Wood*, 12 Id. 110; *Parker v. Stiles*, 5 McLean 44; *Allen v. Hunter*, 6 Id. 303; *Heinrich v. Luther*, Id. 345; *Johnson v. Root*, 2 Cliff. 108; *Wing v. Richardson*, Id. 449; *Judson v. Cope*, 1 Bond 327; *Blanchard v. Puttman*, 2 Id. 84; *Cox v. Griggs*, 1 Biss. 362. And the presumption is strengthened by a de-

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It is incumbent on those who seek to show that the examination of a witness has been improperly rejected, to establish their right to have the evidence admitted; for the court will be presumed to have acted correctly, until the contrary is established.

To entitle a party to examine a witness in a patent cause, the purpose of whose testimony is to disprove the right of the patentee to the invention, by showing its use prior to the patent by others, the provisions of the patent act of 1836, relative to notice, must be strictly complied with.¹

It is incumbent on those who insist upon the right to put particular questions to a witness, to establish that right beyond any reasonable doubt, for the very purpose stated by them; and they are not afterwards at liberty to desert that purpose, and to show the pertinency or relevancy of the evidence, for any other purpose, not then suggested to the court.

A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination; if he wishes to examine him on other matters, he must do so, by making the witness his own, and calling him as such, in the subsequent progress of the cause. A party cannot, by his omission to take an objection to the admission of improper evidence, brought out on a cross-examination, found a right to introduce testimony in chief, to rebut it or explain it.²

Parol evidence, bearing upon written contracts and papers, ought not to be admitted in evidence, without the production of such written contracts or papers; so as to enable both the court and the jury to see whether or not the admission of the parol evidence, in any manner, will trench upon the rule that parol evidence is not admissible to vary or contradict written contracts or papers.

As a general rule, and upon general principles, the declarations and conversations of the plaintiff are not admissible evidence in favor of his own rights. This is, however, but a general rule, and admits and requires various exceptions; there are many cases in which a party may show his declarations comport with acts in his own favor, as a part *of the *res gestæ*; there [*449 are other cases in which his material declarations have been admitted.

In an action for an assault and battery and wounding, the declarations of the plaintiff to his internal pains, aches, injuries and symptoms, to the physician attending him, are admissible, for the purpose of showing the nature and extent of the injuries done to him. In many cases of inventions, it is hardly possible, in any other manner, to ascertain the precise time and exact origin of the invention.

The conversations and declarations of a patentee, merely affirming that, at some former period, he had invented a particular machine, may well be objected to; but his conversations and declarations, stating that he had made an invention, and describing its details, and explaining its operations, are properly deemed an assertion of his right, at that time, as an inventor, to the extent of the facts and details which he then makes known, although not of their existence at an anterior time. Such declarations, coupled with a description of the nature and objects of the invention, are to be deemed a part of the *res gestæ*, and legitimate evidence that the invention was then known and claimed by him; and thus its origin may be fixed, at least, as early as that period.

If the rejection of evidence be a matter resting in the sound discretion of the court, this cannot be assigned as error.

The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the circuit courts, with which the supreme court ought not to interfere; unless it shall choose to prescribe some fixed general rules on the subject, under the authority of the act of congress. The circuit courts possess this discretion in as ample a manner as other judicial tribunals.

Testimony was not offered by a defendant, or stated by him as matter of defence, in the stage of the cause when it is usually introduced, according to the practice of the court; it was offered, after the defendant's counsel had stated, in open court, that they had closed their evidence, and after the plaintiff, in consequence of that declaration, had discharged his own witness; the circuit court refused to admit the testimony: *Held*, that this decision was proper

ERROR to the Circuit Court for the Eastern District of Pennsylvania.
At the April session of the circuit court, James Stimpson instituted an action

cision in his favor, on an appeal from the commissioner. *Ayling v. Hull*, 2 Cliff. 494.

¹ *Blanchard v. Putnam*, 8 Wall. 427.

² *Wills v. Russell*, 100 U. S. 625-6.

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against the plaintiffs in error, for the recovery of damages, for the violation of a patent granted to him by the United States, on the 26th day of September 1835, for "a new and useful improvement in the mode of turning short curves on railroads." The case was tried on the 16th day of February 1839; and a verdict was rendered for the plaintiff, for the sum of \$4250. On the 6th of May 1839, a *remittitur* was entered on the docket of the court, for the sum of \$1000; and a judgment was entered for the plaintiff for \$3250.

On the trial of the cause, the defendants tendered a bill of exceptions to the decision of the court, on their admitting the patent to the plaintiff in evidence; and to other rulings of the court in the course of the trial. The defendants prosecuted this writ of error.

The patent granted by the United States to James Stimpson was as follows: "The United States of America; to all the whom these letters-patent shall come: Whereas, James Stimpson, a citizen of the United States, hath alleged, that he has invented a new and useful improvement in the *mode of turning short curves on railroads, for which letters-patent *450] were granted the 23d day of August 1831; which letters being hereby cancelled on account of a defective specification; which improvement, he states, has not been known or used before his application, hath made oath, that he does verily believe that he is the true inventor or discoverer of the said improvement, hath paid into the treasury of the United States, the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the secretary of state, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose. These are, therefore, to grant, according to law, to the said James Stimpson, his heirs, administrators or assigns, for the term of fourteen years from the 23d day of August 1831, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said improvement, a description whereof is given in the words of the said James Stimpson himself, in the schedule hereto annexed." Tested at Washington, under the seal of the United States, on the 26th day of September 1836, by the president of the United States; and certified, in the usual form, by the attorney-general of the United States.

"The schedule referred to in these letters-patent, and making a part of the same," contained "a description, in the words of the said James Stimpson himself, of his improvement in the mode of turning short curves on railroads, for which letters-patent were granted, dated the 23d day of August 1831, which letters-patent being hereby cancelled, on account of a defective specification." The specification described the invention with minute particularity, and concluded: "What I claim as my invention or improvement, is the application of the flanches of the wheels on one side of railroad carriages, and of the treads of the wheels on the other side, to turn curves upon railways, particularly such as turning the corners of the streets, wharves, &c., in cities and elsewhere, operating upon the principle herein set forth."

1. The bill of exceptions stated, that the counsel for the plaintiff offered in evidence the patent and specification, to the admission of which in evidence, the counsel for the defendant objected; but the objection was overruled by the court, and the evidence was admitted.

2. The defendants offered to give in evidence, by Josiah White, the

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description of a flange upon one side of the railroad cars, and the running upon the tread of the wheel upon the other side, with the flange in a groove, for the turning of curves, which he had seen in use before the date of plaintiff's patent ; which was objected to by the counsel for the plaintiff, and the objection sustained by the court. The objection of the counsel for the plaintiff to the introduction of the testimony of Josiah White, was founded on the absence *of the notice required by the act of congress of the use of the machine at Mauch Chunk ; at which place, it was [*451 said, his testimony would show it had been used.

3. The third exception was to the refusal of the court to allow the defendants to introduce proof of the conversations between the patentee and the counsel of the Baltimore and Ohio Railroad Company, while an arrangement of a suit against the company was made, as to the character and effect of the arrangements.

4. The counsel for the plaintiff, by rebutting evidence, to extend his claim to the invention prior to the time at which the defendants had proved the reduction of the same into use and practice by others, offered to give evidence by witnesses, of the conversations of the patentee, on the subject of his invention, at an anterior period ; which conversations were intended to show the making of the invention by the patentee, before and at the period when the same took place. The counsel for the defendants objected to the admission of this testimony ; but the court overruled the objection.

5. The fifth exception was to the refusal of the court to admit the examination of Dr. Thomas P. Jones. The plaintiff had discharged his witnesses, on the declaration of the defendants' counsel that they had closed their evidence. The testimony asked from Dr. Jones, was to new facts. The court refused to admit the testimony, on the ground, that the testimony was improper, and that it was offered too late.

The case was argued by *Coxe* and *Southard*, for the plaintiffs in error ; and by *J. R. Ingersoll*, for the defendant.

Coxe and *Southard*, on the first exception.—The patent should not have been admitted in evidence. On its face, it is inoperative and invalid. It is not a patent under the act of congress of 1793 ; but it purports to be a substituted patent for one which had been surrendered. It gives to the patentee the same privileges as those which were given by the first patent. It, therefore, should be in strict and exact conformity with the law of 1793, as well as with the subsequent act of congress, authorizing the surrender of a patent for an imperfect specification, and the issue of another. The act of 21st February 1793 requires, by its third section, that the applicant shall be the true inventor of the machine, &c. This is made a *sine qua non* to the granting the patent, and the oath of the claimant is required to this fact. This provision makes the oath necessary, before the secretary of state has authority to grant the patent. There is no remedy, if this has been omitted.

There was no decision, before the case of *Morris v. Huntington*, 1 Paine 348, which affirmed the right of a patentee to surrender his patent for an erroneous or imperfect specification. After this case, congress authorized such a surrender. Act of Congress *of July 3d, 1832. By this act, [*452 the cause of the surrender must be made out to the satisfaction of the secretary of state, when a second patent is asked for. It has been decided,

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that a patent is *prima facie* evidence of the statements on its face. This does not give any other validity to those statements ; and it is not sufficient, that some of the requirements of the act of congress are stated. All must be set forth, and an averment must be made, that everything has been done. There is no halting point. Those requirements exist as to any patent granted after the surrender of a patent. The errors or imperfections in the specification, on which the surrender has been made, should be stated. *Grant v. Raymond*, 6 Pet. 218. In the case cited, there was a recital of the surrender of the patent, and the cause of its surrender. There is in the patent which was before the circuit court, no recital of the imperfections of the first specification ; no allegation that there was no fraud in the transaction. There is nothing shown but the gratuitous act of the officer in granting the second patent. And yet all the prerequisites to the granting of a second patent should appear in it, as well as be of record in the patent-office. Without these essential features in a patent given on the surrender of a previous one for the same invention, it cannot be read in evidence to a jury. The requirements in both the acts of congress of 1792 and 1832, must appear in it. If all those matters are not shown, the second patent stands as a new patent : and by allowing it to be given in evidence, the court altogether disregard the law. If the patent, in this imperfect form, is admitted as *prima facie* proof, all the burden of contradicting it is thrown on the opposite party. Cited, on these points, *Shaw v. Cooper*, 7 Pet. 292.

In support of the second exception, the counsel contended, that the notice given was sufficient to authorize the introduction of the testimony of Josiah White. Cited, on this point, *Evans v. Eaton*, Pet. C. C. 322 ; s. c. 3 Wheat. 454. The notice would have been sufficient, under the act of congress of 1793, and why not under the act of July 3d, 1836 ?

The objection to the introduction of the evidence, by the counsel for the defendants, which was sustained by the court, and which is the subject of the defendant's third exception, was well taken. It was in the power of the plaintiff to have produced his contract with the Baltimore and Ohio Railroad Company, and have rendered this evidence unnecessary. He did not do so.

As to the fourth exception, it is admitted, that it was the right of the plaintiff to prove, by legal rebutting evidence, that the invention made by him, and for which he held the patent, was in use before the period in which the defendant had proved the invention by him. But this evidence could not be given, by showing the conversations of the plaintiff on the subject of the invention, before the date of the first patent. Conversations on the subject of an invention are not the invention ; nor are *453] the ideas of the invention, its actual development. There must be an application of the thought, in the construction of the machine. This is an attempt to give the declarations of a party in evidence, after the actual occurrence of the transaction. No declaration of a person that he intended to take out a patent, could be given in evidence. Cited, on this point, 1 Wheat. 313 ; 10 Serg. & Rawle 27 ; 5 Ibid. 295 ; Roscoe on Evid. 21 ; 4 W. C. C. 58 ; 5 Mason 6 ; 1 Gallis. 438.

As to the fifth exception, the counsel contended, that the evidence of Dr. Jones was rebutting evidence, and was regular ; as it was offered to

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meet and to disprove the plaintiff's declarations, which the court had admitted as testimony.

Ingersoll, for the defendants in error.—

1. The objection to the certificate of the secretary of state should apply rather to the effect than the admissibility of the document. That officer is authorized by law to issue patents, and the presumption is, that he has done so rightfully. Possession of the document does not affect the intrinsic rights of any one. Every question of merit is still open. It enables the patentee to sue; but it neither secures him in the enjoyment of the alleged invention, nor precludes others from contesting the validity of his claims. In the different cases cited, the patent appears to have been received in evidence, exactly in the form now exhibited, although it may have availed nothing to the plaintiff afterwards. *Sullivan v. Redfield*, 1 Paine, 447: "The patent is *prima facie* evidence of the right." The *Margaretta*, 2 Gallis. 519: Remission, though not valid, was given in evidence. See also, *Bingham v. Cabot*, 3 Dall. 19; *Bell v. Morrison*, 1 Pet. 355; *Keene v. Meade*, 3 Ibid. 6; *United States v. Liddle*, 2 W. C. C. 205.

2. The testimony of Josiah White would have been admitted, under the sixth section of the law of 1793. But the 15th (or corresponding) section of the law of 1836, requires notice of place, person and residence. As the law previously stood, great injustice might have been done, unless the court had construed it so as to invest the judge with power to prevent the plaintiff from being taken by surprise. *Evans v. Eaton*, 3 Wheat. 505. The law now wisely anticipates the necessity for an exercise of judicial discretion and possible delay; and requires notice of the place where the improvement is supposed by a defendant to have been previously used. This was not given, and the testimony was necessarily rejected.

3. Although, in truth, the offer to examine Mr. Latrobe upon certain points, was not rejected by the court, but withdrawn by the counsel, yet as it appears by the record to have been a point decided, I will submit to treat it accordingly. The testimony would, no doubt, have been rejected, if the offer had been persisted in, and the delay *that would be requisite to put the record right would be deeply injurious to my client. [*454 (1.) The inquiries suggested for the witness are impracticable, and they lead to impracticable results. The inquiry refers to a "negotiation," "arrangement," and "settlement." It asserts the fact, that a "grant" or "contract," was made. Negotiation is the necessary preliminary to a contract, is absorbed in it, and forms a part of it. How can you separate them? Out of one identified existence, two things are to be made, essentially distinct from each other. That is impossible. (2.) The inquiries are irrelevant. The arrangement contemplated was *res inter alios acta*. The plaintiffs in error were altogether strangers to it. Many inducements may lead to a settlement with one person, which would not render it desirable with another. If it were not that Ross Winans had previously been cross-examined by the counsel for the plaintiffs in the circuit court, to the point of settlement with the Baltimore and Ohio Company, no pretence for the inquiry would exist. If that was wrong, this will not make it right. It was not objected to. If not strictly cross-examination, we had no right to resort to it. *Ellmaker v. Buckley*, 16 Serg. & Rawle 72. If it was regular cross-examination, it

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cannot justify the proposed irregularity. But we were bound to put the witness on his guard as to a collateral fact which might impeach his testimony. Rule in the Queen's case. (3.) The object attempted to prove was a mere entity; an abstraction; nothing actually done, but at best something omitted or avoided; a conclusion or construction; a contingency without a substantial thing to support it. (4.) It was an attempt to prove by parol some known written arrangement, which was susceptible of being produced.

4. Explanations of the patentee himself were good evidence to prove the genuineness of his claims to originality. It is necessary to understand the manner in which this testimony was produced. Plaintiff at first simply produced his patent, and called a witness who proved its utility and the infringement by the defendants. Then the defendants went at large into proof of alleged priority of invention by other persons; all of this went to show a use, before the date of the plaintiff's patent. A necessity was, therefore, thrown upon him, of proving that his invention existed, and was communicated by him to different persons, at a still earlier period. No doubt of the importance of such proof. It consisted of evidence of plaintiff's invention, prior to the defendant's knowledge, or the knowledge of those persons on whom they relied. To meet this particular exigency, that is, to show invention, it is difficult to conceive what can be authentic, except what comes from the inventor himself. He, therefore, produced several individuals, who stated, that he described the improvement to them, at a period considerably earlier than defendants had fixed for its earliest use. If he described it, he must have known it. If he knew it, before
*455] any other person, he must have invented it. That prior knowledge was invention; and that was the very thing to be proved.

Two objections were taken to the character of the proof: 1st. That it was derived from the plaintiff himself: 2d. That the alleged improvement was not then brought into practical use by him.

Answer 1st. It was an invention; else not patentable: in other words, it must spring from himself. An exhibition of it must necessarily, in some shape or other, be his act. Whatever might be said or done by others, could not be available to him. The exhibition might be effected by deeds, signs or words. It matters not in what particular manner the effect is produced, but the discovery must make manifest its paternity; and it can do so only through the medium of its proper parent. This may be done by his works—a machine constructed. Let it be produced; original, practical, perfect in all its parts. Nothing is gained by the author, unless something more than all this appears, viz., authorship. However eloquent the machine may be as to its uses, it cannot speak for itself, as to its author. The nearest it can come to speech would be an inscription or label on its front: "*J. S. fecit*," for example. That would, at best, be a written declaration. What difference would it make, that the writing, or stamping, or printing, should be in a book? That description of evidence in a sister department of the law, is conclusive of important rights. In maintaining copyrights, the writing of the party is the essence of the discovery, and the sole proof of invention or originality. If, instead of writing with his own hand, the same author dictates to another person, cannot the amanuensis prove the dictation, and hence the authorship? A blind author has often given to the world the

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result of his genius, through the pen of another. On a question of authorship, surely the testimony of the scribe would be received as competent. Another species of proof of invention remains, namely, oral explanation alone. Why may it not be received? It is the very thing itself. To speak it, was to create it, if it did not already exist in thought; and if it did, it must prove it. The proof was given, to counteract the allegation of earlier discovery. It produces the effect, by showing that the earlier discoverers, as they are regarded, received from the plaintiff the information which enabled them to put the invention in use, and then attempt to deny the right of showing how the information was communicated and obtained. One of the very pieces of testimony objected to, consisted of a conversation with the person who claimed to be an inventor in preference to the plaintiff. The declarations did not stand alone; they were accompanied by two drawings and a model. The date of the existence of these monuments is clearly proved. The conversations became but a part of the *res gestæ*. There are many occasions on which one's own sayings and doings are good evidence; in some instances, the best, and in others, the only *evidence. The present is an anomaly, unless it concurs. It does not follow, that the [*456 expressions of an individual are the illegal creation of testimony for himself. Such are, 1. Various kinds of declarations *ante litem motam*; 2. When the sayings are the doings, as in cases of notice; 3. Where the expressions of an individual are the test of a given state of things, as intellect; 4. Proof of a contract, as marriage, by words *de presenti*; 5. Almost any other discovery or invention, not connected with the useful arts. A reward is offered for lost property; the finder informs of the finding of it; the declarations can be proved.

Answer 2d. As to the objection that the explanations were not reduced to practice. Here, too, the objection loses sight of the fact, that our evidence was not original, but merely designed to meet a collateral issue as to the period of invention, and not exactly as to invention itself. On any ground, however, the question of invention does not depend upon whether the thing has been reduced to practice, but whether it can be. Not whether it is actually practised, but practicable. Drawings, descriptions and models are sent to the patent-office. These are miniature likenesses, not the thing itself. Any other course would, in many instances, be quite impracticable. A ship, a house, a town, are often the recipients of an improvement which cannot be practically exhibited, except in connection with the vast object to which it is applied. Sometimes, the reducing to practice might be destructive of life or property. A guillotine need not be rehearsed, in order to prove its power. Besides, it might destroy the very intention, to insist on practical exercise. It might be regarded as giving the invention to the public, and then the patent right is gone for ever.

5. Thomas P. Jones was called by the defendants, after all the testimony in chief, on both sides, and the plaintiff's rebutting testimony also, had been given, and his witnesses dismissed; and much time had been occupied in giving rebutting testimony for the defendants. The declared object was, to prove that the invention described in the plaintiff's patent of 1835, was different from the invention described by him in his patent of 1831: in other words, that the patent which purported to be a mere correction of form, was in substance a totally different thing. We are struck at once with an incon-

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sistency between this point, and the whole tenor of the defendants' case. The notice which they gave, the aim of their evidence, their great design, is to show that the thing relied on by the plaintiff, which was patented by him in 1835, was well known and used in 1831; known to everybody, publicly, notoriously. Yet we are now told, that it was not known even to the plaintiff himself; but that he found it necessary, four years afterwards, to desert the alleged invention of 1831, and surreptitiously to foist in a different thing, which then became known to him for the first time. Unless this be the true meaning of the point, it has none. The evidence offered was original and direct. It contradicted nothing already asserted in evidence. It was directed to a point in *no way collateral. It went immediately to the essential *457] merits of the case. It was of great importance, undoubtedly. Nothing could be more conclusive against the plaintiff. Not only would it be destructive of his claim to originality; but it would prove a most audacious fraud, abortively attempted, and calculated, when detected, to deprive him of all standing in or out of court, and to render his defeat as disgraceful as it was inevitable.

Notice of all this ought to have been given, perhaps. It is not urged, however, as an argument, that none was received; although it might have been calculated to take the plaintiff by surprise. But it was a fact, above all others, requiring, and in its nature admitting of, countervailing proof. Not a clerk in the office, probably, could have failed to give material testimony in reply. These persons were at a distance; and we should have been left to the question of probability, whether a man, in any extremity of impudent fraud, would have ventured to place two totally different patents side by side in the office, asserting that they were in substance identical.

The evidence offered was not the best the nature of the case admitted of. Contradiction was to be proved between two written instruments, with, perhaps, a model accompanying each of them. Copies would be the proper sources of illustration. Were copies not accessible? We do not know. No inquiry was made. A thousand copies may have been made, before the patent-office was destroyed. Plaintiff himself, no doubt, had such copies in his possession. No notice was given to him to produce them, before this violent attempt was made to introduce secondary evidence.

To get rid of all this, the argument was, that the difference was only to be inferred between the patents, from a difference between the conversation and one of them. But that would rebut nothing. No person denied that plaintiff's conversations with the witnesses he produced, were as they were sworn to be. Other conversations with other persons might have shown descriptions of other inventions; but they could not possibly show that the first conversations did not take place. The judge gave two reasons for rejecting the testimony. One was, that it was offered at too late a stage of the cause. That was ruled in his sound discretion; from the exercise of that discretion there is no appeal. No attempt was made to take one. On both of his grounds he was right. But one was sufficient to cover the whole question, and it is inaccessible to review here.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the judgment of the circuit court for the eastern district of Pennsylvania, rendered in an action brought by Stimpson, the defendant in error, against

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the plaintiffs in error, for a violation of a patent-right granted to him for a new and useful improvement in the mode of turning short curves on railroads. A patent was originally granted to Stimpson, for the same invention, on the 23d day of August 1831; and the renewed patent, upon which *the present suit is brought, was granted on the 26th of September 1835, upon [*458 the former letters-patent "being cancelled on account of a defective specification," and the renewed patent was for the term of fourteen years from the date of the original patent. With the exception of the recital of the fact that the former letters-patent were cancelled "on account of a defective specification," and "the statement of the prior date from which the renewed patent was to begin to run, the renewed patent is in the precise form in which original patents are granted."

At the trial, upon the general issue, a bill of exceptions was taken to certain rulings of the court upon points of evidence, to the consideration of which we shall at once proceed, without any further preface. The first exception taken is to the admission of the renewed patent as evidence in the cause, to the jury. The patent act of 1832, ch. 162, § 3, under which this patent was obtained, provides, that whenever any patent shall be inoperative or invalid, by reason that any of the terms or conditions prescribed by the prior acts of congress, have not, by inadvertence, accident or mistake, and without any fraudulent or deceptive intention, been complied with on the part of the inventor, it shall be lawful for the secretary of state, upon the surrender to him of such patent, to cause a new patent to be granted to the inventor, for the same invention, for the residue of the period then unexpired for which the original patent was granted, upon his compliance with the terms and conditions prescribed by the third section of the act of the 21st of February 1793, ch. 55. Now, the objection is, that the present patent does not contain any recitals that the pre-requisites thus stated in the act have been complied with, viz., that the error in the former patent has arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention; and that without such recitals, as it is the case of a special authority, the patent is a mere nullity, and inoperative. We are of opinion, that the objection cannot, in point of law, be maintained. The patent was issued under the great seal of the United States, and is signed by the president, and countersigned by the secretary of state. It is a presumption of law, that all public officers, and especially such high functionaries, perform their proper official duties, until the contrary is proved. And where, as in the present case, an act is to be done, or patent granted, upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act or granted the patent, is *prima facie* evidence that the proofs have been regularly made, and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency. It is not, then, necessary for the patent to contain any recitals that the pre-requisites to the grant of it have been duly complied with, for the law makes the presumption; and if, indeed, it were otherwise, the recitals would not help the case without the *auxiliary proof that these pre-requisites had been, *de facto*, [*459 complied with. This has been the uniform construction, so far as we know, in all our courts of justice, upon matters of this sort. Patents

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for lands, equally with patents for inventions, have been deemed *prima facie* evidence that they were regularly granted, whenever they have been produced under the great seal of the government; without any recitals or proofs that the pre-requisites of the acts under which they have been issued have been duly observed. In cases of patents, the courts of the United States have gone one step farther, and as the patentee is required to make oath that he is the true inventor, before he can obtain a patent, the patent has been deemed *prima facie* evidence that he has made the invention. This objection, then, is overruled; and there was no error in the circuit court in the admission of the patent.

The next exception is to the refusal of the court to allow a witness, Josiah White, to give a description of an invention which he had seen on the Mauch Chunk railroad, in 1827, which had a groove on one side, and ran on the other on a flange for crossing, for the purpose of showing that the supposed invention of the plaintiff was known and in use by others, before the date of his patent. By the patent act of 1836 (which was applicable to the present point), it is provided, in the 15th section, that whenever the defendant relies in his defence on the fact of a previous invention, knowledge or use of the thing patented, he shall state in his notice of special matter to be used in his defence, the names and places of residence of those, whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used. The object of this most salutary provision is, to prevent patentees being surprised, at the trial of the cause, by evidence of a nature which they could not be presumed to know, or be prepared to meet, and thereby to subject them either to most expensive delays, or to a loss of their cause. It is incumbent on those who seek to show that the examination of a witness has been improperly rejected, to establish their right to have the evidence admitted; for the court will be presumed to have acted correctly, until the contrary is established. In the present case, there is no proof on the record, that notice had been given according to the requirements of the statute, that White was to be a witness, for the purpose above stated. Unless such notice was given, it is plain, that the examination could not be rightfully had. The *onus probandi* is on the defendants to show it, and unless they produce the notice, the objection must fail. In point of fact, it was admitted by counsel, at the argument, that no such notice was given. In either view, then, from the admission, or from the defect of the preliminary proof of notice in the record, the exception is not maintainable.

The next exception is to the refusal of the court to allow certain questions to be put by the defendants to John H. B. Latrobe, a witness introduced by the defendants to maintain the issue on their part. Latrobe, on *460] his examination, stated, "I know Mr. Stimpson *by sight and character. He granted to the Baltimore and Ohio Railroad Company the privilege of using the curved ways on their railroad, and all lateral roads connected therewith. I fix the date of the contract in the early part of October 1834, because I have then a receipt of Mr. Stimpson's counsel, for \$2500. Mr. Stimpson laid his claim against the Baltimore Company for an infringement of his patent, in 1832. It was referred to me by the company, and I advised them." The counsel for the defendants then offered to prove by the same witness, the declarations of the plaintiff and his agent, to the witness, that the settlement made with the Baltimore and Ohio Railroad

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Company with the plaintiff, was not an admission by the said company of the plaintiff's right in the alleged invention, but a mere compromise of a pending suit, disconnected with a grant in writing, made by the plaintiff to the said company ; and to that end, proposed to put the following questions, respectively, and in order, to the witness : " 1. Do you know who was the agent of attorney of James Stimpson, in negotiating the arrangement and settlement between him and the company referred to ? Who was he ? 2. State, if any conversations occurred between James Stimpson, or his agent or counsel, at any time, during the negotiations, regarding the rights claimed by him in the patent for curved ways, without reference to the existence of a written contract, or its contents ? 3. What were they ? " The court refused to allow these questions to be put, for the purpose aforesaid.

Now (as has been already intimated), it is incumbent upon those who insist upon the right to put particular question to a witness, to establish that right beyond any reasonable doubt, for the very purpose stated by them ; and they are not afterwards at liberty to desert that purpose, and to show the pertinency or relevancy of the evidence for any other purpose, not then suggested to the court. It was not pretended, at the argument, that the evidence so offered was good evidence in chief, in behalf of the defendants, upon the issue in the cause. It was *res inter alios acta*, and had no tendency to disprove the defendant's title to the invention, or to support any title set up by the defendants ; for no privity was shown between the defendants and the Baltimore company. As evidence in chief, therefore, it was irrelevant and inadmissible. The sole purpose for which it was offered, so far as it was then declared to the court, was to show, that the compromise with the Baltimore company was not founded on any admission of the plaintiff's right in the invention. Be it so ; it was then inconsequential ; for it certainly had no just tendency to disprove his right. If the compromise had been offered on the part of the plaintiff, for the purpose of establishing his right to the invention, there is no pretence to say, that it would have been admissible against the defendants. In the converse case, it is equally inadmissible for the defendants.

But it is now said, that the evidence was in fact offered for the purpose of rebutting or explaining certain statements made by one *Ross [*461 Winans, a witness called by the defendants, in his answers upon his cross examination by the plaintiff's counsel. Now, this purpose is not necessarily, or even naturally, suggested by the purpose avowed in the record. Upon his cross-examination, Winans stated : " I understood there were arrangements made with the Baltimore company. I heard the company paid \$5000." Now, certainly these statements, if objected to by the defendants, would have been inadmissible upon two distinct grounds. 1. First, as mere hearsay ; 2. And secondly, upon the broader principle, now well established, although sometimes lost sight of in our loose practice at trials, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him as such, in the subsequent progress of the cause. The question, then, is presented, whether a party can, by his own omission to take an objection to the admission of improper evidence brought out on a cross-examination, found a right to introduce testimony in chief to

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rebut it or explain it. If, upon the cross-examination, Winans's answer had been such as was unfavorable to the plaintiff, upon the collateral matters thus asked, which were not founded in the issue, he would have been bound by it, and not permitted to introduce evidence to contradict it. There is great difficulty in saying, that the defendants ought to be in a more favored predicament, and to acquire rights founded upon the like evidence to which they did not choose to make any objection, although otherwise it could not have been in the cause. But waiving this consideration, the grounds on which we think the refusal of the court was right, are ; first, that it was not distinctly propounded to the court, that the evidence was offered to rebut or explain Winans's testimony ; and secondly, that in the form in which it was put, it proposed to separate the written contract of compromise from the conversations and negotiations which led to it, and to introduce the latter without the former, although it might turn out that the written paper might most materially affect or control the presumptions deducible from those conversions, and negotiations. We think, that upon the settled principles of law, parol evidence bearing upon written contracts and papers, ought not to be admitted, without the production of such written contracts or papers, so as to enable both the court and the jury to see, whether or not the admission of the parol evidence in any manner will trench upon the rule, that parol evidence is not admissible to vary or contradict written contracts or papers.

The next exception is to the admission of the evidence of William A. Stimpson, Richard Caton and George Neilson, as to certain declarations, and statements, and conversations of the plaintiff, as to his invention, prior to the date of his original patent ; in order to rebut the evidence of the defendants, as to the invention or use by other persons of the same contrivance, before that date. The objection *is, that, upon general *462] principles, the declarations and conversations of a plaintiff, are not admissible evidence in favor of his own rights. As a general rule, this is undoubtedly true. It is, however, but a general rule, and admits and requires various exceptions. There are many cases in which a party may show his declarations comport with acts in his own favor, as a part of the *res gestæ*. There are other cases, again, in which his material declarations have been admitted. Thus, for example, in the case of an action for an assault and battery and wounding, it has been held, that the declarations of the plaintiff, as to his internal pains, aches, injuries and symptoms, to the physician called to prescribe for him, are admissible for the purpose of showing the nature and extent of the injuries done to him. See 1 Phillips on Evid. ch. 12, § 1, p. 200-2 (8th ed., 1838). In many cases of inventions, it is hardly possible, in any other manner, to ascertain the precise time and exact origin of the particular invention. The invention itself is an intellectual process or operation ; and like all other expressions of thought, can in many cases scarcely be made known, except by speech. The invention may be consummated and perfect, and may be susceptible of complete description in words, a month, or even a year before it can embodied in any visible form, machine or composition of matter. It might take a year to construct a steamboat, after the inventor had completely mastered all the details of his invention, and had fully explained them to all the various artisans whom he might employ to construct the different parts of the

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machinery. And yet from those very details and explanations, another ingenious mechanic might be able to construct the whole apparatus, and assume to himself the priority of the invention. The conversations and declarations of a patentee, merely affirming that, at some former period, he invented that particular machine, might well be objected to. But his conversations and declarations, stating that he had made an invention, and describing its details and explaining its operations, are properly to be deemed an assertion of his right, at that time, as an inventor, to the extent of the facts and details which he then makes known; although not of their existence at an antecedent time. In short, such conversations and declarations, coupled with a description of the nature and objects of the invention, are to be deemed a part of the *res gestæ*; and legitimate evidence that the invention was then known to and claimed by him, and thus its origin may be fixed, at least, as early as that period. This view of the subject covers all the parts of the testimony of the witnesses objected to in the circuit court; and we are of opinion, that the court were right in admitting the evidence.

The next and last exception is, to the rejection of the evidence of Dr. Jones, who was offered to prove that there were material differences between the patent of 1831, and the renewed patent of 1835, and to explain these differences. No doubt can be entertained, that the testimony thus offered was, or might be, most material to *the merits of the defence. And [*463 the question is not as to the competency or relevancy of the evidence, but as to the propriety of its being admitted at the time when it was offered. It appears, that the testimony was not offered by the defendants, or stated by them as a matter of defence, in the stage of the cause when it is usually introduced according to the practice of the court. It was offered, after the defendants' counsel had stated in open court, that they had closed their evidence, and after the plaintiff, in consequence of that declaration, had discharged his own witnesses. The question, then, is, whether it was, at that time, admissible on the part of the defendants, as a matter of right; or whether its admission was a matter resting in the sound discretion of the court. If the latter, then it is manifest, that the rejection of it cannot be assigned as error.

The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are, properly, matters belonging to the practice of the circuit courts, with which this court ought not to interfere; unless it shall choose to prescribe some fixed, general rules on the subject, under the authority of the act of congress. Probably, the practice in no two states of the Union is exactly the same; and therefore, in each state, the circuit courts must necessarily be vested with a large discretion, in the regulation of their practice. If every party had a right to introduce evidence, at any time, at his own election, without reference to the stage of the trial in which it is offered, it is obvious, that the proceedings of the court would often be greatly embarrassed, the purposes of justice be obstructed, and the parties themselves be surprised by evidence destructive of their rights, which they could not have foreseen, or in any manner have guarded against. It seems to us, therefore, that all courts ought to be, as indeed they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administration of justice to suitors; and we think that the circuit courts possess this discretion

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in as ample a manner as other judicial tribunals. We do not feel at liberty, therefore, to interfere with the exercise of this discretion; and, indeed, if we were called upon to say, upon the present record, whether this discretion was, in fact, misapplied or not, we should be prepared to say, that we see no reason to doubt that it was, under all the circumstances, wisely and properly exercised. It is sufficient for us, however, that it was a matter of discretion and practice, in respect to which we possess no authority to revise the decision of the circuit court.

Upon the whole, we are of opinion, that the judgment of the circuit court ought to be affirmed, with costs.

Judgment affirmed.

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*UNITED STATES v. ISAAC MORRIS.

Slave-trade.

Indictment under the second and third sections of the act of congress, entitled "an act to prohibit the carrying on the slave-trade, from the United States to any foreign place or country," passed 10th May 1800.

The schooner *Butterfly*, carrying the flag of the United States, and documented as a vessel of the United States, and having the usual equipments of vessels engaged in the slave-trade, sailed from Havana, towards the coast of Africa, on the 27th July 1839; she was captured by a British brig of war, and sent into Sierra Leone, on suspicion of being Spanish property; at the time of the capture, Isaac Morris was in command of the vessel, and was described in the ship's papers, and described himself, as a citizen of the United States; the vessel was sent, by the British authorities at Sierra Leone, to be dealt with by the authorities of the United States: *Held*, that to constitute the offence denounced in the second section of the act of 10th May 1800, it was not necessary that there should have been an actual transportation or carrying of slaves in the vessel of the United States, in which the party indicted served. 2. The voluntary service of an American citizen on board a vessel of the United States, in a voyage commenced with intent that the vessel should be employed in the slave-trade, from one foreign place to another, is an offence against the second section of the law, although no slaves had been transported in such vessel, or received on board of her. 3. To constitute the offence under the third section of the act, it was not necessary that there should be an actual transportation of slaves in a foreign vessel, on board of which the party indicted served. 4. The voluntary service of an American citizen on board a foreign vessel, in a voyage commenced with intent that the vessel should be employed and made use of in the transportation of slaves from one foreign country to another, is, in itself, and where no slaves have been transported in such vessel, or received on board of her, an offence under the third section of the act. In expounding a penal statute, the court, certainly, will not extend it beyond the plain meaning of the words; for it has been long and well settled, that such statutes must be construed strictly; yet the evident intention of the legislature ought not to be defeated by a forced and over-strict construction.¹

CERTIFICATE of Division from the Circuit Court for the Southern District of New York. The defendant, Isaac Morris, was indicted under the second and third sections of the act entitled "an act in addition to an act entitled 'an act to prohibit the carrying on the slave-trade from the United States to any foreign place or country,'" approved on the 10th of May 1800.

The first count of the indictment charged that the defendant did, on the high seas, from the 15th day of June, until the 26th day of August, in the

¹ American Fur Co. v. United States, 2 Pet. United States v. Winn, 3 Sumn. 209; The 358; United States v. Hartwell, 6 Wall. 385; Enterprise, 1 Paine 32

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year 1839, voluntarily serve on board of the schooner *Butterfly*, a vessel of the United States; employed and made use of in the transportation of slaves from some foreign country or place to some other foreign country or place; the said defendant being a citizen of the United States. The second count charged, that the defendant did, on the high seas, from the 15th day of June to the 26th day of August, voluntarily serve on board of the schooner *Butterfly*, being a foreign vessel employed in the slave-trade; the defendant being a citizen of the United States.

*It was proved, on the trial, on the part of the prosecution, that the schooner *Butterfly*, carrying the flag of the United States, and [*465 documented as a vessel of the United States (her register being dated the 24th day of May 1839, and issued by the collector of New Orleans, to Nathan Farnsworth, a citizen of the United States, as owner), was boarded and examined, on the 26th day of August 1839, on the high seas, in latitude 5° 25' north, longitude 30° east, near Cape St. Paul's, on the coast of Africa, by the British brig of war *Dolphin*, on suspicion of being a Spanish vessel engaged in the slave-trade, in contravention of the treaty between Great Britain and Spain for the suppression of the slave-trade. That on such examination, the vessel was found to be on her voyage from Havana, in the island of Cuba, which port she had left on the 27th day of July 1839, bound to St. Thomas, in the island of Principe, near the coast of Africa; that the vessel had on board twenty-four large leaguers capable of containing each from 250 to 300 gallons of water; eighteen of these were in shoeks, that is, the staves were in bundle, not fitted; four of them contained water, and two contained bread; there was a quantity of plank stowed away in the hold, similar to the planks used in framing slave-decks, but this plank could not have been fitted as a slave-deck until the vessel had discharged her cargo; and that such leaguers and slave-decks were commonly found to be a part of the equipments and fittings of vessels engaged in the slave-trade on the coast of Africa; that she had on board a full cargo, consisting of various commodities, adapted either to the traffic in negroes, or to any lawful trade carried on by trading vessels upon the coast of Africa; that the prisoner was in command of the vessel; that he was described in the ship's papers, and represented himself, as a citizen of the United States; that the rest of the ship's company were represented in the crew-list as Spaniards or Portuguese, who had been shipped at Havana; that there were also on board fourteen Spaniards who had been received at Havana as passengers; that the cargo had been shipped at the same place, and according to the invoice and bill of lading, was to have been delivered at St. Thomas, in the island of Principe aforesaid, and appeared, by the documents, to be owned by persons residing at Havana; that two log-books, one in English and the other in Spanish, were found on board; that various documents in the Spanish language were also found on board; that under these circumstances, the vessel was captured by the *Dolphin*, suspecting the same to be Spanish property, and sent for adjudication to Sierra Leone, to be proceeded against in the mixed commission court at that place, which court declined taking cognisance of the case, on account of the vessel being documented as an American vessel; that she was then sent to the port of New York, to be dealt with by the authorities of the United States as they might think proper.

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No slaves were found on board the vessel at the time of her capture ; and it was testified by the witnesses for the prosecution, that from the cargo and situation in which the vessel was found, no *slaves could have *466] been carried or transported in her at any time during the voyage on which she was then engaged ; that it would have been necessary to have discharged the cargo, before slaves could have been taken on board ; that the vessel was short of water, having only about eleven gallons on board, when she was captured ; and that Cape St. Paul's was a common watering place on that coast, being about five hundred miles distant from the island of Principe.

Upon the foregoing state of facts, the judges were divided in opinion upon the four following questions ; which were presented on the facts aforesaid for their decision :

1. Whether it is necessary, in order to constitute the offence denounced in the second section of the act of the 10th of May 1800, above referred to, that there should be an actual transportation or carrying of slaves, in the vessel of the United States on board of which the party indicted is alleged to have served.

2. Whether it is necessary, in order to constitute the offence denounced in the third section of the act of the 10th of May 1800, above referred to, that there should be an actual transportation or carrying of slaves, in a foreign vessel, on board of which the party indicted is alleged to have served.

3. Whether the voluntary service of an American citizen, on board a vessel of the United States, on a voyage commenced with the intent that the vessel should be employed and made use of in the transporting or carrying of slaves from one foreign country or place to another, is, in itself, and where no slaves had been transported in such vessel, or received on board her, an offence under the said second section.

4. Whether the voluntary service of an American citizen, on board a foreign vessel, on a voyage commenced with the intent that the vessel should be employed and made use of in the transportation and carrying of slaves, from one foreign country or place to another, is, in itself, and where no slaves had been transported in such vessel, or received on board her, an offence under the said third section.

Which points were stated under the direction of the court, at the request of the counsel for the parties in the cause, and ordered to be certified into the supreme court of the United States, pursuant to the act in such cases made and provided.

The case was argued by *Gilpin*, Attorney-General of the United States, for the plaintiffs ; and by *Nelson*, for the defendant. Mr. *Philip Hamilton* submitted a written argument for the defendant.

Gilpin, for the United States.—The questions that present themselves in this case are these : 1. Whether the voluntary service on board of an American vessel, on a voyage commenced with the intent that she shall be employed in the transportation and carrying of slaves, is a violation of the second section of the act of 10th May 1800 (2 U. S. Stat. 70), without any *467] slaves being actually transported or carried ? *2. Whether the voluntary service on board of a foreign vessel, on a voyage commenced with the intent that she shall be employed in the slave-trade, is a violation

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of the third section of the same act, without any slaves being actually transported or carried?

In the construction of a statute, the first inquiry is, what was the intention of the legislature? The second, whether that intention is so clearly expressed as to embrace within its prohibition the acts complained of.

I. The whole scope of the enactments of congress shows their intention to punish every American citizen who engages in the slave-trade. As early as 1794, they passed an act "to prohibit carrying on the slave-trade." (1 U. S. Stat. 347.) This was followed, in 1800, by an additional act for the same purpose. (2 Ibid. 70.) In 1807, and in 1818, acts were passed, "to prohibit the importation of slaves into the United States." (Ibid. 426; 3 Ibid. 450.) In 1819, additional prohibitions against "the slave-trade" were adopted. (Ibid. 532.) And finally, in 1820, it was declared to be piracy. (Ibid. 600.) This series of acts evinces the evident intention of congress to prevent the slave-trade—the traffic; whether to the United States, or to foreign countries.

When we examine the particular provisions of these various laws, the same intention is yet more apparent. The fitting out of vessels for the trade, their sailing outward, their employment in the actual traffic, their bringing slaves to the United States, or taking them to foreign ports, are all matters of minute regulation. No citizen can fit out or equip a vessel for the slave-trade, either in any part of the United States, or in any other place, to sail from the United States; nor can he hold any property, directly or indirectly, in a vessel engaged in transporting slaves between two foreign countries; nor can a vessel sail from the United States to engage in such traffic; and if she clears out for the coast of Africa, security against her engaging in such traffic may be required, and must be given. (1 U. S. Stat. 347; 2 Ibid. 70; 3 Ibid. 450.) These are provisions to guard against, prevent and punish the preparatory or previous steps connected with this traffic. Again, the president is to cause an armed vessel to cruise on the African coast, and to bring into our ports all American vessels intended to transport slaves; severe penalties are provided against any citizens who shall there take slaves on board, or transport them to a foreign country, or to the United States; or be found with any so brought, for the purposes of sale, in any of our ports or bays; or hold, sell or dispose of them. (1 U. S. Stat. 347; 2 Ibid. 205, 426; 3 Ibid. 450, 532.) Here, then, is a series of enactments, providing against every contingency in which American citizens can be connected with this traffic, except their service in American or foreign vessels, during the outward voyage. Is it possible, that congress could omit to provide for this also? Yet such is the fact, unless they have done so by the second and third sections of the act of 10th May *1800. [468 (2 Ibid. 70.) It is a well-established rule, that the cause producing a law, and the general object to be attained, are to be considered in construing it. *Preston v. Browder*, 1 Wheat. 124. If this rule be applied, the inference is irresistible, that the legislature intended, by these sections, to include that portion of the traffic which is not elsewhere provided for; that they intended the voluntary participation of our citizens in it should be punished, independently or equally with other conduct connected with such participation.

II. Is this intention so expressed in the act, as to subject an offender to

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its penalties? Is he adequately warned, by its language, of the nature of the offence? No doubt is expressed as to the clearness with which the intention of congress is made known on all points but one. The person, the service, the vessel, are clearly designated. But "the voyage," which it was intended to prohibit, is supposed to be doubtful. It is alleged, that "employment in the transportation and carrying of slaves," cannot refer to the outward voyage; but relates exclusively to one during which the vessel has slaves actually on board. Is this the import of the words? Are they not a general designation of the prohibited traffic? Do they not signify the business in which the vessel is employed? Coaches are engaged "in the transportation of passengers:" surely, the occasional want of a passenger does not change the character or description of their employment. Carriers are engaged in the transportation of merchandise, though their vehicles may be sometimes empty. Vessels are engaged in the fisheries, though a voyage of thousands of miles is necessary, before they reach the place where they are actually employed in fishing. Carriers of the mail are properly so designated, though no mail be, at a particular moment, in their charge. Persons are employed in the post-office, though not performing, at every instant, the duties annexed to their office. Tonnage duties are payable by vessels "employed in the transportation of goods coastwise," at every entry, though they may be occasionally without a cargo. This construction is sanctioned by numerous acts of congress, relating to navigation, the fisheries, and the post-office establishment. 1 Story's Laws 5, 208; 2 Ibid. 1353; 3 Ibid. 1986; 4 Ibid. 2256.

But this signification is made more obvious by an examination of the particular statutes on this subject. The act of 1794 is entitled, "to prohibit carrying on the slave-trade" (1 U. S. Stat. 347), yet it provides against the "fitting out" of vessels in our ports. How is this "carrying on the slave-trade," unless all parts of the general design are included in that phrase? So, the act of 3d March 1819 (3 Ibid. 552), was passed "to prohibit the slave-trade;" yet it subjects vessels "intended for the purpose of carrying slaves," to forfeiture. So, the act of 10th May 1800 (2 Ibid. 70), upon the construction of which the present case turns, and which provides both for the punishment of persons, and the forfeiture of vessels; condemns a vessel for being *469] engaged in the *business of the slave-trade. Can it be contended, that the outward voyage of a vessel fitted out for the slave-trade is not included in that language; and if so, is it possible to exclude from the punishment prescribed by the act, a person voluntarily and knowingly serving on board the vessel, when its object was evidently to reach the one as well as the other? Again, the third section punishes a citizen of the United States who voluntarily serves on board of a foreign vessel engaged in the slave-trade; the second section punishes a citizen of the United States who voluntarily serves on board of an American vessel, engaged in transportation and carrying of slaves. Could congress intend to make the same act of a citizen of the United States more or less criminal in the one case than in the other? Yet so it must do, if a different meaning is to be given to the language used in the two sections.

The construction contended for is also sanctioned by judicial decisions. The case of *The Alexander*, 3 Mason 175, was an indictment for holding a right of property in a vessel "employed in the transportation and carrying

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of slaves." The vessel was prepared for that purpose, but had taken no slaves on board; yet the defendant was convicted. In the case of *The Fortuna*, 1 Dods. 81, the outward voyage was held to be a violation of the slave-trade acts. In the case of *The Donna Marianna*, Ibid. 91, Sir WILLIAM SCOTT condemned a vessel, on the outward voyage, and not having taken any slaves on board, under the act of 23d May 1806 (23 Raithby's Stat. at Large 326), although the words of that act only embrace a vessel in which slaves "shall be exported, transported, carried," &c. These are direct judicial decisions on the point in question. The same principle of interpretation may be recognised in other cases. *The Emily and Caroline*, 9 Wheat. 381, was a libel, under the act of 22d March 1794, which condemns a vessel, if she shall be fitted out for the slave-trade. Her fitting out was but just begun, yet it was held sufficient. In *The Merino*, 9 Wheat. 391, two points are established: that the act of 10th May 1800 was meant to prevent any citizen of the United States from participating in or affording facilities for the slave-trade; and this general intent was to be regarded in its construction. *The Plattsburgh*, 10 Wheat. 133, was condemned for being fitted out, under the act of 22d March 1791, though the equipment was only commenced. In the *United States v. Gooding*, 12 Wheat. 460, the vessel sailed from Baltimore, without any fitments, they being sent in another vessel to St. Thomas, where she was to put them on board; yet this was held to be a fitting out at Baltimore. In the *United States v. Quincy*, 6 Pet. 464, an indictment for fitting out a vessel, with intent to employ her in committing hostilities, was sustained, although the fitment were admitted to be insufficient.

The result is, that where the general intent of a statute is to prevent certain acts, the subordinate proceedings, necessarily connected with them, and coming within that intent, are embraced in its provisions. It is true, that in penal laws, a more rigid rule of construction *prevails, than [*470 in relation to other statutes; but that rule does not authorize or contemplate a merely literal interpretation, at the expense of an evident intent, so expressed as to be well known to a person violating it. 5 Wheat. 76, 95; 2 Mason 144; 1 Paine 209. The act forbidden to be done was, voluntarily serving in this voyage, which was a voyage for the purpose of transporting slaves; whether or not that purpose was fully effected, is immaterial, if it has been proved to the satisfaction of the jury, that such was in fact the purpose of the voyage then in progress; and that the participation of the defendant in it was voluntary on his part, with a knowledge of that purpose.

Philip Hamilton, for the defendant, submitted the following written argument: Though four points are presented on the record, there are substantially but two, viz., the first and fourth. These decided, dispose of the others.

1. To sustain the prosecution, the case of *The Alexander*, 3 Mason, is chiefly relied on. The analogy, though ingenious, does not seem just; as between a fostered trade and a pursuit denounced by a penal statute, to interpret that statute. The language used by congress in reference to the fisheries should not be adopted in reference to the slave-trade; as the act in relation to the former speaks of "carrying on fisheries;" "employed in the

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fisheries ;" "a fishing voyage ;" without defining any acts that shall constitute the pursuit or employment : it is otherwise in regard to the slave-trade. See Acts of Congress of 18th February 1793 (1 U. S. Stat. 305); Act of June 19th, 1813, § 1, 2 (3 Ibid. 2).

2. It is improbable, that the act of 1800, § 3, aimed to reach intent ; as the intent could not have been manifested in any other manner than by the precise acts inhibited by the second section, viz., the carrying, &c. The honest and the guilty trade would have been precisely similar to a certain point. Both vessels would go to the coast ; both would be similarly equipped ; both would there take slaves on board. The next movement indicates the intent, and is the very carrying trade denounced by the second section. It would be a strange anomaly, to legislate in regard to intent, after having legislated in regard to the particular fact, when the intent could only be established by the consummation of the act forbidden. Contemporaneous circumstances and interests repel the idea that intent was aimed at, as the friends of the trade would never jeopard it by exposing the lawful trader to be captured on her outward voyage, in order to discover, from the vessel, evidence that she intended to prosecute an unlawful trade.

3. If congress aimed at intent, it would have been so expressed in the *471] act. No acts were ever more deliberated on, or more artificially *prepared, than the early slave acts. The friends of the trade watched the legislation with too much jealousy, not to detect that lurking object, if it had existed. Refer to all the acts, and it will be found that wherever intent has been aimed at, it has been distinctly expressed. 1st, 2d and 3d sections of the act of March 1794 (1 U. S. Stat. 347); 2d and 3d sections of the act of 20th April 1818 (3 Ibid. 450).

4. If the prosecutor can claim that intent was involved in the third section of the act of 1800, why may he not say it was also the subject of the fourth section of the act of May 15th, 1820? both acts using synonymous expressions—the act of 1800, "employed in the slave-trade ;" act of 1820, "carrying on the slave-trade." So, the third section of the same act subjects the offenders to capital punishment, who, "engaged in a piratical cruise or enterprise," shall land and commit robbery. The expressions are as general as "carrying on fisheries ;" "a fishing voyage :"; yet, could a man be guilty of the capital offence, who was on board of a vessel designed for "carrying on the slave-trade," who did not decoy, or land and forcibly seize slaves ; or who was "engaged in a piratical cruise or enterprise," and did not land and commit robbery? In this prosecution, the United States seek, by blending the second and third sections of the act of 1800, to sustain the construction that intent was aimed at. With the same propriety, they might contend, that the moment this vessel sailed from her home port, she was guilty of piracy, under the act of 1820, because she might have been designed for the purposes therein specified. This expanding and enlarging of statutes by construction ; this adaptation of statutes to the varying facts and circumstances of each case, rather than applying the varying facts to the immutable statute, is wholly inadmissible ; especially so, in criminal jurisprudence.

5. In the case of *The Alexander*, the learned judge interprets the first and second sections, by the third and fourth, and thinks congress intended the same thing. Admitting that, to a certain extent, they mean the same,

we still contend, that the third and fourth sections are to be interpreted by the first and second. The meaning of the second section we get from the act itself, viz., the actual carrying of slaves. Section 1st (1800) gives double the value of slaves which may have been transported or carried. Section 4th forfeits all but the slaves which may have been found on board ; also, precludes the right to claim slaves found on board. The language of the second section so clearly and explicitly expresses the offence intended to be denounced, that every man who reads must understand what is forbidden ; hence there is no room for construction ; and the language must be taken in its natural sense and ordinary signification and import. 1 Kent's Com. 462. The words of a statute are to be taken in their natural sense, and ordinary signification and import. In the *United States v. Willberger*, 5 Wheat. 96, it is held : Where *there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, to [*472 justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.

That the second section is limited to the actual transportation, as we claim for it, will appear from a brief historical view of the slave acts. The constitution, art. 1, § 9, declares, that the migration or importation of such persons, as any of the states now existing (1789) shall think proper to admit, shall not be prohibited by congress, prior to the year 1808. That article secures the import trade, for a given period. In 1794, the current of public sentiment became irresistible, and by the act of that date, the traffic was cut up, so far as measures suggested themselves to the wisdom of congress, and were consistent with the sacred obligation of that instrument. The cardinal objects of the trade which could be reached, were the export and carrying trade. The subjects in regard to which congress could legislate, were vessels and persons. They might legislate over the property of citizens and foreigners residing within the United States, as well as over their persons. By § 1 of the act of 1794, vessels of citizens or foreigners fitted out from the United States to be employed in the export or carrying trade, were forfeited. By the 2d section of that act, they reached the persons of citizens or foreigners in the United States, by a severe penalty, who should fit out the vessels. Thus the subject rested, until the year 1800, when it was ascertained that the act of 1794, did not effectually accomplish its object ; as ingenuity, sharpened by the hope of gain, soon devised means to evade that law. The carrying trade was found so lucrative, that though vessels might not be fitted out from the United States, still American capital might be embarked in foreign vessels. By § 1 of the act of 1800, all right and property directly or indirectly owned in any vessel (American or foreign) employed in the carrying trade, was forfeited. Thus, American capital and American vessels being excluded, congress determining still further to cut up the trade, prohibited American citizens from rendering their personal services to promote it, and did so by the second and third sections of the act of 1800. The act of 1800 was merely auxiliary to the act of 1794 ; and from a careful examination of both, it will appear, that congress therein exhausted all their powers of legislation on the subject, embarrassed as it was by the constitution.

6. It thus appearing, that to prevent American citizens from serving on board of American vessels employed in the carrying trade, was an essential

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link in the system, it is obvious, that the second section is to be expounded precisely as the concise and perspicuous language expresses, and that there is no room for construction. In the third section, a different form of expression is adopted. It would, *perhaps, be assuming too much to say, *473] that the change was not a change of substance, rather than a loose and inartificial employment of language. We contend, that the third section means the same thing as the second, and something more. It means the slave-trade in foreign vessels, in all its illegal branches, so declared by congress. The second section is confined to one portion of it. It could not refer to the slave-trade prohibited by the laws of any other country, for two obvious reasons: 1. Because American citizens are not to be punished by the laws of the United States, for a violation of the municipal laws of any other power. 2. If otherwise, in point of fact, the slave-trade was a lawful trade in all its branches throughout the world, until long after this period. In 1807, the first act of the parliament of England was passed on this subject. If this proposition be correct, then the slave-trade punished by the third section, was the trade prohibited by congress, viz., the carrying trade and the export trade on board of foreign vessels; to embrace these two branches, the general expression, "slave-trade," was peculiarly appropriate. Whatever might have been the object of congress, it is evident, by collating the acts and the sections of each, that the construction claimed for it by the prosecution cannot be sustained.

7. In addition to these considerations, the defect of wisdom should not be attributed to congress of passing a law that must inevitably result in the consummation of a wicked purpose. Once embarked in the pursuit, it is more dangerous to recede than to advance; when to go forward presents the alluring prospects of gain, with the same, and perhaps, greater chances of impunity.

Nelson, for the defendant, stated, that he would only ask the attention of the court to the acts of congress. The act of 1794 was intended to embrace two descriptions of cases. First, transporting of slaves from a foreign country to the United States: second, transporting slaves to foreign countries. It also applies to fitting out vessels to carry on the slave-trade. This was the condition of the law, when the act of 1800 was passed; and the object of that act was, to make the penalties of the former act applicable to vessels not built in the United States. The purpose of this prosecution is not to forfeit the vessel, but to punish persons serving on board of a vessel engaged in the slave-trade. The employment of a person on board a vessel engaged in the transportation and carrying of slaves, is a very different thing from the employment of a vessel, or person on board of a vessel, designed to be employed in the slave-trade. Whenever the legislature design to punish intention, they so express it.

TANEY, Ch. J., delivered the opinion of the court.—This case comes before us upon a certificate of division from the circuit court of the United States, for the southern district of New York, in the second circuit. *474] *The defendant, Isaac Morris, is indicted under the second and third sections of the act entitled "an act in addition to an act entitled 'an act to prohibit the carrying on the slave-trade from the United States to any foreign place or country,' approved on the 10th of May 1800. The

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first count of the indictment charges that the defendant did, on the high seas, from the 15th of June until the 26th of August, in the year 1839, voluntarily serve on board of the schooner *Butterfly*, a vessel of the United States, employed and made use of in the transportation of slaves from some foreign country or place, to some other foreign country or place, the said defendant being a citizen of the United States. The second count charges that the defendant did, on the high seas, from the 15th day of June to the 26th day of August, voluntarily serve on board of the schooner *Butterfly*, being a foreign vessel employed in the slave-trade ; the defendant being a citizen of the United States.

It was proved on the trial, on the part of the prosecution, that the schooner *Butterfly*, carrying the flag of the United States, and documented as a vessel of the United States, sailed from Havana, for the coast of Africa, on the 27th of July 1839, having on board the usual and peculiar equipments of vessels engaged in the transportation of slaves from the coast of Africa to other places. Before she reached the African coast, and before any slaves were taken on board, she was captured by the *Dolphin*, a British brig of war, and carried into Sierra Leone, upon suspicion of being Spanish property, to be proceeded against in the mixed commission court at that place. At the time of her capture, Isaac Morris was in command of the vessel, and was described in the ship's papers and represented himself as a citizen of the United States. The court at Sierra Leone declined taking cognisance of the case, because the vessel was documented as an American vessel ; and she was then sent to New York, to be dealt with by the authorities of the United States, as they might think proper. Upon the foregoing state of facts, the judges were divided in opinion upon the four following questions, which were presented on the facts aforesaid for their decision :

1. Whether it is necessary, in order to constitute the offence denounced in the second section of the act of the 10th of May 1800, above referred to, that there should be an actual transportation or carrying of slaves in the vessel of the United States, on board of which the party indicted is alleged to have served ?

2. Whether it is necessary, in order to constitute the offence denounced in the third section of the act of the 10th of May 1800, above referred to, that there should be an actual transportation or carrying of slaves in a foreign vessel, on board of which the party indicted is alleged to have served ?

3. Whether the voluntary service of an American citizen, on *board [475 a vessel of the United States, in a voyage commenced with the intent that the vessel should be employed and made use of in the transporting or carrying of slaves from one foreign country or place to another, is, in itself, and where no slaves had been transported in such vessel, or received on board her, an offence under the said second section ?

4. Whether the voluntary service of an American citizen, on board a foreign vessel, in a voyage commenced with the intent that the vessel should be employed and made use of in the transportation and carrying of slaves from one foreign country or place to another, is, in itself, and where no slaves have been transported in such vessel, or received on board her, an offence under the said third section ? And these points having been certified to this court, we proceed to express our opinion upon them.

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The second section of the act of congress above mentioned, declares, "that it shall be unlawful for any citizen of the United States, or other person residing therein, to serve on board any vessel of the United States, employed or made use of in the transportation or carrying of slaves from one foreign country or place to another; and any such citizen or other person, voluntarily serving as aforesaid, shall be liable to be indicted therefor, and on conviction thereof, shall be liable to a fine not exceeding \$2000, and be imprisoned not exceeding two years." The first and third points certified from the circuit court, depend on the construction of this section.

In expounding a penal statute, the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled, that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 Wheat. 95.

The question in this case is, whether a vessel, on her outward voyage to the coast of Africa, for the purpose of taking on board a cargo of slaves, is "employed or made use of" in the transportation or carrying of slaves from one foreign country or place to another, before any slaves are received on board? To be "employed" in anything, means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it. And this is not only the ordinary meaning of the word, but it has frequently been used in that sense in other acts of congress. Thus, for example, the second section of the act of March 3d, 1825, entitled, "an act to reduce into one, the several acts establishing and regulating the post-office department," declares, "that the postmaster-general, and all other persons 'employed' in the general post-office, or in the care, custody or conveyance of the mail, shall, previous to entering upon the duties assigned to them," take the oath prescribed by that section. Here, the persons who have contracted to perform certain duties in the general post-office, are described as "em-^{*476}ployed" in that department, before they enter upon the duties assigned them. So also, in the twenty-first section of the same law, various offences, such as the embezzling or destroying any letter, are enumerated, and the punishment prescribed, when committed by any person "employed in any of the departments of the post-office establishment." Yet it cannot be supposed, that the party must be actually engaged in transacting his official duties, when the letter was embezzled or destroyed, in order to constitute the offence described in this section. Again, the act of July 2d, 1813, § 8 (3 U. S. Stat. 4), declares, that certain vessels "employed" in the fisheries, shall not be entitled to the bounties therein granted, unless the master makes an agreement, in writing or in print, with every fisherman employed therein, before he proceeds on any fishing voyage. Here, the vessel is spoken of as "employed" in the fisheries, before she sails on the voyage. So also, the act of March 3d, 1831 (4 Ibid. 492), entitled, "an act concerning vessels employed in the whale fishery," authorizes vessels owned by any incorporated company, and "employed wholly in the whale fishery," to be registered or enrolled, and licensed in a particular manner, "so long as any such vessel shall be wholly employed in the whale fishery." The register or enrollment and license, must be obtained before the vessel sails on her outward voyage to the whaling grounds; and consequently, in that voyage she must be

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"employed" in the whale fishery, in the sense in which these words are used in the act of congress; otherwise, she would not be entitled to the register or enrollment and license authorized by this law.

In like manner, the vessel in question was employed in the transportation of slaves, within the meaning of the act of congress of May 10th, 1800, if she was sailing on her outward voyage to the African coast, in order to take them on board, to be transported to another foreign country. In such a voyage, the vessel is employed in the business of transporting and carrying slaves from one foreign country to another. In other words, she is employed in the slave-trade. And any citizen of the United States, who shall voluntarily serve on board any vessel of the United States, on such a voyage, is guilty of the offence mentioned in the second section of this act of congress. It is hardly necessary to add, that "voluntarily," in this section, means, "with knowledge" of the business in which she is employed. And in order to constitute the offence, the party must have knowledge that the vessel was bound to the coast of Africa, for the purpose of taking slaves on board, to be transported to some other foreign country. The same reasoning applies to the third section of the law, under which the second and fourth points certified to this court have arisen. The vessel is "employed in the slave-trade" when sailing to the African coast for the purpose of taking the slaves on board.

We, therefore, answer the first and second questions in the negative, *and the third and fourth in the affirmative; and it will be certified [*477 accordingly to the circuit court.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided and was argued by counsel. On consideration whereof, it is the opinion of this court: 1. That it is not necessary, in order to constitute the offence denounced in the second section of the act of the 10th of May 1800, referred to, that there should be an actual transportation or carrying of slaves in the vessel of the United States, on board of which the party indicted is alleged to have served. 2. That it is not necessary, in order to constitute the offence denounced in the third section of the act of the 10th of May 1800, above referred to, that there should be an actual transportation or carrying of slaves in a foreign vessel, on board of which the party indicted is alleged to have served. 3. That the voluntary service of an American citizen on board a vessel of the United States, in a voyage commenced with the intent that the vessel should be employed and made use of in the transporting or carrying of slaves from one foreign country or place to another, is, in itself, and where no slaves had been transported in such vessel, or received on board her, an offence under the said second section. 4. That the voluntary service of an American citizen on board a foreign vessel, in a voyage commenced with the intent that the vessel should be employed and made use of in the transportation and carrying of slaves from one foreign country or place to another, is, in itself, and where no slaves had been transported in

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such vessel, or received on board her, an offence under the said third section. Whereupon, it is now here ordered and adjudged that it be so certified to the said circuit court accordingly.

*478] *UNITED STATES, Appellants, v. Heirs of ELEAZER WATERMAN, Appellees.

Florida land-claims.

A grant of land by the government of Florida, made before the cession of Florida to the United States by Spain, confirmed: every point involved in the case having been conclusively settled by the court, in their former adjudications in similar cases.

APPEAL from the Superior Court of East Florida.

The case was submitted to the court, on the record, by *Gilpin*, Attorney-General, for the United States.

BALDWIN, Justice.—This case comes up by appeal from the superior court of East Florida, in which the claim of the appellees to a tract of land described in the record, was confirmed by a decree of that court, proceeding pursuant to the acts of congress for the final adjustment of claims to land in that territory.

It has been very candidly and properly admitted by the attorney-general, that every point involved in the case has been conclusively settled by this court, in their former adjudications on similar cases; it, therefore, becomes unnecessary to state the nature of the claim now before us, further than that it is founded on a lawful grant, on conditions which have been fully performed by the grantee. This court, therefore, orders, adjudges and decrees, that the decree of the court below, adjudging that the title of the appellees is valid under the treaty of 22d February 1821, between the United States and Spain, the laws and customs of Spain, the law of nations, and of the United States, be and the same is hereby affirmed; and the cause is remanded to the court below, with directions to proceed further therein, and to cause such further proceedings to be had as by law is directed.

Decree affirmed.

*479] *WILLIAM and JAMES BROWN & Co., Plaintiffs in error, v. THOMAS McGRAN, Defendant in error.

Principal and factor.—Construction of instruments.

An action was instituted against the consignees of 200 bales of cotton, shipped, by the direction of the owner, to Liverpool, on which the owner had received an advance by an acceptance of his bills on New York; which acceptance was paid out by bills drawn on the consignees of the cotton in Liverpool. Some time after the shipment of the cotton, the owner wrote to the consignees in Liverpool, expressing his "wishes" that the cotton should not be sold, until they should hear further from him; in answer to this letter, the consignees said, "your wishes in respect to the cotton are noted accordingly;" no other provision than from the sale of the cotton, for the payment of the advance, was made by the consignor, when the same was shipped; and no instructions for its reservation from sale were given, when the shipment was made. Immediately after the acceptance of the bill drawn against the cotton, on the consignees in Liverpool, they sold the same for a profit of about ten per cent. on the shipment; cotton rose in price, in Liverpool, to more than fifty per cent. profit on the invoice, between the

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acceptance of the bill of exchange, and the arrival of the same at maturity. The shipper instituted an action against the consignees, for the recovery of the difference between the actual sales and the sum the same would have brought, had it been sold at the subsequent high prices at Liverpool.

It is certainly true, as a general rule, that the interpretation of written instruments properly belongs to the court, and not to the jury; but there certainly are cases, in which, from the different senses of the words used, or their obscure or indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury, for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects, and intentions and agreements of the parties are often to be arrived at, only by allusions to circumstances which are but imperfectly developed.¹

There can be no reasonable doubt, that in particular circumstances, a wish expressed by a consignor to a factor, may amount to a positive command.

In the case of a simple consignment of goods, without any interest in the consignee, or any advance or liability incurred on account thereof, the wishes of the consignor may fairly be presumed to be orders; and the "noting the wishes accordingly," by the consignees, an assent to follow them; but very different considerations apply where the consignee is one clothed with a special interest, and a special property, founded upon advances and liabilities.

Whenever a consignment is made to a factor, for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made, or liabilities incurred, on account thereof; and the factor is bound to obey his orders; this arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property in the goods, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances, or meet such liabilities; unless there be some agreement between himself and the consignor which contracts or varies the right.²

If, contemporaneously with the consignment and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold, before a fixed time, in such a case, the consignment is presumed to be received, subject to such order; and the factor is not at liberty to sell the goods to reimburse his advances, until after that time has elapsed. So, when orders are given, not to sell below a fixed price; unless the consignor shall, after due notice and request, refuse to provide other means to reimburse the factor. In no case, will the factor be at liberty to sell the consignment, contrary to the

¹ Turner v. Yates, 16 How. 23.

² Where factors have made large advances, or incurred expenses on account of the consignment, the principal cannot, by any subsequent orders, control their right to sell, at such time, as in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves and to promote the interests of the consignor; they acting, of course, in good faith and with reasonable skill. *Field v. Farrington*, 1 Pars. 141. There is no doubt, that such a course of dealing may exist between consignor and consignee, as would restrain the latter from selling at less than the invoice prices, without further advice; but all such cases must depend on their own special circumstances, such as the usual course of previous dealings between the parties, the usages of the particular business, &c. The consignment of goods on which advances are asked and received, involves the right in the consignee to sell the goods in the usual and accustomed manner, and at the regular market rates, in order to

the closing of the transaction, and for the reimbursement of his advances. And where the consignor does not desire to subject himself to such liabilities, he should make special arrangements to meet his own views in relation thereto. After receiving an advance on his goods, the power of the consignor, in the absence of a special agreement to limit the prices at which they shall be sold, is at an end. He can impose no new terms on his consignee; the latter is bound no further to his principal, than to use all due and proper diligence, skill and attention, in selling the goods thus consigned, at the best rate the market affords, and in the manner required by the established customs and usages of trade. *Smedley v. Williams*, 1 Pars. (Pa.) 364-5. *KING*, P. J. Nor can an attaching creditor of the consignor arrest the sale, without tendering to the consignee a repayment of his advances. *Baugh v. Kirkpatrick*, 54 Penn. St. 84. And see *Blackwell v. Thomas*, 28 N. Y. 67; *Williams v. Tilt*, 36 Id. 319.

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orders of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities.

When the consignment is made, generally, without any specific orders as to the time and mode of sale, and the factor makes advances or incurs liabilities on the footing of such *con-

*480] signment, the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors, to sell, in the exercise of a sound discretion, at such time, and in such manner, as the usage of trade and his general duty require, and to reimburse himself for his liabilities, out of the proceeds of the sale; and the consignor has no right, by any subsequent orders, given after advances have been made, or liabilities incurred, by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities.

If a sale of cotton in Liverpool, by a factor, has been made on a particular day, tortiously, and against the orders of the owner, the owner has a right to claim damages for the value of the cotton on the day the sale was made, as for a tortious conversion; if the sale of the cotton by the factor was authorized on a subsequent day, and the cotton had been sold against orders, before that day, the damages to which the owner would be entitled would be regulated by the price of cotton on that day; but the rate of damages is not to be obtained from the prices of cotton at any time between the day when the cotton was sold, against the orders of the owner, and the day on which the sale was authorized by him.

ERROR to the Circuit Court of Georgia. In the inferior court of Richmond county, in the state of Georgia, Thomas McGran, the defendant, instituted a suit, by attachment, against the plaintiffs in error, to recover damages for the sale of two hundred bales of cotton, shipped by him to the plaintiffs in error, as his factors; the cotton having been sold for a less price than the same would have produced, had the sales been made according to the instructions of the shipper.

The declaration contained three counts, all upon the shipment of the two hundred bales of cotton, by Thomas McGran to William and James Brown & Company, at Liverpool, as the factors of the shipper. The first count alleged, that while the cotton remained in the hands of the consignees, the shipper ordered him to hold the cotton until they should hear from him again; but the same was sold in violation of the order, and to the damage of the shipper. The second count charged the consignees with not having exercised reasonable diligence in keeping and selling the cotton; but that they dealt with the same so negligently and carelessly, so that it was sold at a loss to the shipper. The third count alleged, that the consignees did not sell the cotton to the best interests of the shipper, nor did they obey his instructions; but on the contrary, managed the same carelessly and negligently, and sold the same, contrary to orders, with a reasonable prospect of rise of the article, for \$3000 less than the value of the cotton, at the time the same was sold.

The case was removed, under the provisions of the judiciary act of 1789, to the circuit court of the United States for the district of Georgia; the defendants below not being citizens of the state of Georgia, and not residing in that state.

The defendants pleaded the general issue, and the cause having been tried in the circuit court, the jury gave a verdict for the plaintiff, Thomas McGran, under the directions of the court, for \$4975.57. *The defend-

*481] ants excepted to the ruling of the circuit court, on questions submitted during the trial of this cause, and they prosecuted this writ of error.

On the trial, it was given in evidence, that two hundred bales of cotton were shipped by defendant in error, from Mobile, to the plaintiffs in error,

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at Liverpool, as his factors, to be sold by them under a *del credere* commission. That this cotton was received by them, about the 9th of April 1833, and cost, *per invoice*, \$9151.77. That the plaintiffs in error, through Brown, Brothers & Company, their house in New York, accepted, early in March 1833, a draft of defendant in error, for \$9000, drawn against said cotton, upon their said house in New York; that when this draft arrived at maturity, the said house in New York paid the same, and in order to reimburse themselves, and in pursuance of an arrangement between plaintiffs in error and defendant in error, drew upon the plaintiffs in error, at Liverpool at sixty days' sight, for 1871*l.* 0*s.* 9*d.* This draft was dated May 7th, 1833, was accepted by plaintiffs in error, at Liverpool, June 3d, 1833, and fell due and was paid by them on the 5th of August following. That by the contract between the plaintiffs in error, and the defendant in error, the cotton in question became pledged by the defendant in error to the plaintiffs in error, to enable them to meet their acceptances and repay their advance thereon. After shipping the cotton and drawing against it as aforesaid, the defendant in error became insolvent.

On June 3d, 1833, plaintiffs in error sold said two hundred bales of cotton for 2073*l.* 4*s.* 6*d.*, cash, September 16th, 1833; being a profit of about ten per cent. On the same day on which they sold this cotton, they sold 677 bales, in which their Baltimore house was interested; and, in a week previous, had sold 216 bales, in which their Baltimore house was also interested. At the time of the sale of the 200 bales of cotton, the defendant in error was indebted to plaintiffs in error in a large sum. During the week in which the 200 bales were sold, the sales of cotton amounted to 47,250 bales; a larger amount than in any previous week for about eight years.

On April 20th, 1833, the defendant in error wrote to plaintiffs in error: "If you have any cottons on hand, when this reaches you, in which I am interested, I wish you to hold them until you hear from me again." This letter was received by William and James Brown & Company, on the 23d of May 1833; and on the day following, the 24th of May 1833, they wrote to Thomas McGran: "We are in possession *of your esteemed favor [*482 of the 20th ultimo, and your wishes in respect to the cotton we now hold on your account, are noted accordingly." On June 9th, following, the plaintiffs in error wrote to defendant, annexing a circular, showing the extensive business done in cotton during the week, and a material improvement in prices; and informed him, that, believing this advance would probably equal the expectations he had formed when he last wrote, and thinking it desirable to close his cotton in their hands, as they had then been drawn upon for the advance on it, they had taken advantage of this brisk demand to dispose of the 200 bales at an advance of one-half to five-eighths of a penny per pound upon its value when first landed. On July 30th, 1833, the defendant in error replied to the last letter, referring to his previous letter of April 20th, and asked of plaintiffs in error, "why did you sacrifice my cottons, as the draft drawn by Brown, Brothers & Company, at sixty days, on account of these cottons, could not have been accepted more than a day or two before? Therefore, you had sixty days before you had any money to pay for me." He adds, "I do not recognise the sale; and do not consider you authorized to sell the cotton before the time the draft drawn on you by Brown, Brothers & Company, against this cotton, falls due. If the

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price is higher on that day than the day you sold it, I will expect you to allow me the difference ; and if it is lower, I will be prepared to pay you any balance I may owe you." On September 4th, 1833, the plaintiffs in error replied, that there had been a balance due to them from defendant ; that the 200 bales were sold at an advance, and barely squared the accounts. That defendant had been obliged to stop payment, that any loss would be certain to fall on them, and profit not likely to go to him, but to his creditors. That the cotton was not sacrificed, but sold at a profit, such as is not frequently realized on that article ; that they sold some on account of their Baltimore house, and some immediately before, and immediately after, in which their said Baltimore house was interested. That near 50,000 bales changed hands in the same week. That, situated as the defendant in error then was, he could not reasonably have expected them to hold the cotton, without pointing out in what manner they should be indemnified in event of loss thereby. That the fact that Brown, Brothers & Company's draft was not due, did not alter the case, as they had become responsible some months before, by Brown, Brothers & Company's acceptance of the draft of the shippers. On July 22d, 1833, the defendant in error wrote to plaintiffs, that he had received their favor of the 24th of May, and noted the contents. That they would please to sell the 200 bales soon after the receipt of the letter, unless they were of opinion they could do better by holding a little longer. This letter was received by the plaintiffs in error, August 23d, 1833.

*The counsel for the defendant below prayed the court to
 *483] instruct the jury, that the matters given in evidence on the part of the defendants were sufficient, and ought to be admitted to bar the plaintiff's action ; which instruction the court refused to give.

And the court further refused to instruct the jury : 1. That the advance by the house of Browns, in New York, was in effect an advance by the house in Liverpool ; and after the advance so made, the shipper had no right to alter the instructions which were given at the time of such advance. 2. That the house in Liverpool having advanced so large an amount on this cotton, having a large previous unsettled claim against the shipper, and the said shipper having afterwards, and before the sale of the cotton, become insolvent ; the house in Liverpool had a right to sell for their reimbursement, notwithstanding the subsequent orders of the shipper.

And the court instructed the jury, that it was their exclusive province to decide from the evidence in the cause, whether the defendants had advanced any money to the plaintiff on the cotton shipped by the Mary and Harriet. Whether, when the defendants sold said cotton, the plaintiff was indebted to them upon a previous unsettled claim, and whether the plaintiff had become insolvent before the sale of said cotton ; and also further instructed the jury, that if they found from the evidence in the cause, that the plaintiff had given instructions to the defendants, by his letter of the 20th of April 1833, not to sell any cottons which the defendants might have on hand when that letter reached them, in which the plaintiff was interested, until the defendants heard from him again, and that such instructions were received and recognised by the defendants, by the evidence in the cause, and particularly by a letter given in evidence as one from the defendants to the plaintiff, dated the 24th of May 1833, in reply to the plaintiff's letter

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to them of the 20th of April 1833 ; that then the defendants were not justifiable in law in the sale of the 3d of June 1833, on account of the defendants having on that day accepted Brown, Brothers & Company's draft for 1871*l.* 0*s.* 9*d.*, dated 7th of May 1833, at sixty days' sight. And the court further instructed the jury, that if they found from the evidence in the cause, that cottons were selling for a higher price from the 3d June 1833, when the draft was accepted, and when the cotton was sold, until the time when the said draft was mature and payable, and if the evidence in the cause ascertained, at any time before the maturity of the draft, what such higher price was, and that the cotton belonging to the plaintiff could have been sold for such higher price ; that then the plaintiff was entitled to recover from the defendants the difference in price between the sum for which the defendants sold the plaintiff's cotton, and the sum at which it might have been sold before or at the maturity of the draft. The defendants in the circuit court excepted to these instructions.

*The case was argued by *G. W. Brown*, for the plaintiffs in error ; and by *Jones*, for the defendant. [*484]

Brown contended : 1. That although an agent is generally bound to conform to the instructions of his principal, the circumstances of this case were such as to give the plaintiffs in error a right to sell the cotton in question, notwithstanding the letter of the defendant in error, of April 20th, 1833. The cotton was shipped by McGran to the Browns, as his factors ; and this circumstance alone was equivalent to an authority to sell. The definition of a factor is, "an agent who is commissioned by a merchant or other person to sell goods for him, and to receive the proceeds." Selw. N. P. 827. If, at the time when the consignment was made, the consignor had given instructions as to the manner or time of sale, the consignees would have been bound to comply with them. But no such instructions were given. This was a general consignment ; and the evidence discloses the fact, that, upon the faith of this consignment, the Browns accepted bills to the amount of nearly the full value of the cotton. The invoice cost of the cotton was \$9151.77 ; the bill drawn against it amounted to \$9000. The evidence further shows (and all the evidence in the case was offered by the defendant in error) that this bill was accepted by the plaintiffs in error, through their house in New York of Brown, Brothers & Company. When this bill arrived at maturity, it was paid by the house in New York, who, in order to reimburse themselves, drew a bill upon the plaintiffs in error, dated May 7th, 1833, at sixty days' sight, for 1871*l.* 0*s.* 9*d.*, which was accepted by them, June 3d, 1833, and fell due and was paid on the 5th of August following. This arrangement was in conformity with the contract made by the parties, was in accordance with the regular course of trade, and was highly advantageous to the shipper. The cotton arrived at Liverpool, April 9th, 1833, and was not sold until June 3d—a period of fifty-five days. At the time of the sale, McGran was indebted to the plaintiffs in error in a considerable balance, and had become insolvent.

Under these circumstances, it is contended, that the plaintiffs in error acquired a special property in the cotton, with a power of sale, in order to reimburse themselves for the advance made through their house in New York, and to put themselves in funds to meet their acceptance of the bill

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drawn by said house against the shipment. 2 Kent's Com. 640, 642 ; Story on Bailments 204-5, 218 ; Story on Agency 382 ; *Parker v. Brancker*, 22 Pick. ; 40 ; 3 Chitty on Com. & Manuf. 551 ; *Pothonier v. Dawson*, Holt 383 ; *Zoit v. Millauden*, 16 Mart. 470.

The contract of the consignees with the consignor, in effect amounted to this : " We will consent to accept to such an amount *upon your *485] consignment, provided we have the right of selling, in order to put ourselves in funds to meet our acceptance." That such a right to sell existed, seems to be admitted by McGran throughout the correspondence ; notwithstanding his complaints as to the time when the sale was made. Upon the principles of commercial law, McGran, having drawn upon the Messrs. Brown without having funds in their hands, was bound to put them in funds to meet the bill so drawn. *Bainbridge v. Wilcocks*, 1 Bald. 538.

There is a strong analogy between the case of a consignment of goods, to secure an acceptance or advances, and the case of a mortgage with a power to sell annexed. *Drinkwater v. Goodwin*, Cowp. 256. In both cases, there is a power to sell, coupled with an interest or estate in the thing pledged. *Rice v. Austin*, 17 Mass. 200 ; *Hunt v. Rousmanier*, 8 Wheat. 203. This power was irrevocable ; it could not be affected by the express revocation of McGran, nor by the death of bankruptcy of the consignor or consignees. Story on Agency 387, 504 ; 1 Bell's Com. § 413 (4th edit.). And, *a fortiori*, it could not be revoked by the mere expression of McGran's wishes, contained in his letter of April 20th. McGran does not "order" nor "direct ;" he does not even "request ;" but makes use of the mildest word that can express the idea of desire ; he simply "wishes." But it will be contended, that McGran's wishes became binding upon the plaintiffs in error, upon their supposed assent contained in their reply of May 24th, 1833. They there say, that they had received the letter of defendant in error, and that his wishes in respect to the cotton they then held on his account were "noted accordingly." The expression means nothing more than that they observed the wishes of their correspondent, as contained in his letter ; they do not promise to comply with them in all events ; they reserve to themselves the privilege of giving effect to them or not, as might be consistent with the protection of their own interests and legal rights. The expression "to note" never properly means to assent ; and no usage can be found to justify our attaching to it such a signification in this case. Crabbe's Syn. ; Webster's Dict. There are many much stronger cases in the law, where similar expressions have been decided not to be equivalent to an assent. *Perring v. Hone*, 4 Bing. 18, Opinion of BEST, J. ; *Rees v. Warwick*, 2 Barn. & Ald. 133 ; observed upon by PARKE, J., in *Fairlie v. Herring*, 13 Eng. C. L. 78 ; *Powell v. Jones*, 1 Esp. 17 ; 2 Pardessus, *Cours de Droit Commercial*, 171.

But if, in mercantile language, the expression conveys the idea of assent, there should be some evidence offered of that fact. The learned judge before whom the case was tried, erred in leaving it to the jury to say : 1st. Whether the defendant in error, by his letter of April 20th, instructed the plaintiffs in error ; and 2d. Whether the plaintiffs in error recognised these instructions ; when no evidence whatever was laid before the jury to enlighten them as to the meaning of the expressions used. Story on *486] Agency, 63, 72, note 1 ; **Ekins v. Macklish*, Ambl. 184-5 ; *Mechan-*

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ies' Bank v. Bank of Columbia, 5 Wheat. 326 ; *Lucas v. Groning*, 7 Taunt. 164 ; *Macbeath v. Haldimand*, 1 T. R. 172. McGran, in his letter of July 30th, in which he complains of the sale of the cotton, really admits the right of the Browns to sell, in order to meet the bill drawn on them. He says, "I do not recognise the sale, and do not consider you authorized to sell the cotton before the draft drawn on you by Brown, Brothers & Company, against this cotton, falls due. If the price is higher on that day than the day you sold it, I will expect you to allow me the difference ; and if it is lower, I will be prepared to pay you any balance I may owe you." Now, this abandons the whole ground. McGran, by his letter of April 20th, had instructed, as it is contended on the other side, the plaintiffs in error, not to sell until they heard from him again. They did not hear from him again until August 23d, when his next letter, dated July 22d, and ordering them to sell, was received. Now, the plaintiffs in error were bound by the instructions of McGran, or they were not. If they were bound, they had no right to sell until August 23d, when his orders to sell were received. If they were not bound, as McGran admits (for he concedes that they had a right to sell at the date of the maturity of the draft, August 5th), then they were to use their own discretion, as skilful and honest factors, as to the time of sale. McGran admits they had a right to sell, in order to meet the bill, notwithstanding his instructions ; but limits them to a single day—that of the maturity of the draft. This position is absurd. On that day, it might have happened, that no purchasers could be found, or that the cotton had fallen so low that the whole would not produce enough to meet the bill. Again, if McGran had the right to instruct his factors to hold his cotton for four months, he would have had the same right to instruct them to hold it for four years. He might have done so with little inconvenience to himself ; for he had received as an advance nearly the whole invoice cost. This argument derives much additional force, from the fact that McGran, at the time when the order not to sell was given, had become insolvent, and was in debt to plaintiffs in error.

The policy of the law will induce the court to uphold the sale. The Messrs. Brown acted in good faith, and, no doubt, with prudence, although the result proved unsatisfactory. They did all that could be expected, for they acted for McGran precisely as they did for themselves. On the same day, they sold 677 bales, on account of nine different parties, in part of which their Baltimore house was interested ; and, within a week previously, 215 bales, in which the Baltimore house was also concerned. A larger business was done at Liverpool in cotton, during the week in which the sale was made, than had been done in any one week for the preceding eight years. The cotton was held upwards of fifty days, and sold at a profit of nearly *ten per cent. more, according to the testimony, than is generally [*487 realized in that article. Where no fraud is chargeable on an agent, his conduct ought to receive a liberal and favorable construction. *Drummond v. Wood*, 2 Caines 310. But if the plaintiffs in error did recognise the instructions of the defendant in error, it was merely an admission as to the legal effect of a contract, and cannot conclude them. 2 Phil. on Evid. (4th edit.), and cases there cited.

But conceding, for the sake of argument, that the correspondence in the case amounts to an agreement on the part of the plaintiffs in error, that they

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would hold the cotton until instructed by McGran to sell; it is contended, that such an agreement would not be binding, because it was made without consideration. A valuable consideration had already passed between the parties. McGran had shipped cotton to plaintiffs in error, who, upon the faith of the shipment, had come under an advance and acceptance to a large amount; the contract was then concluded, and binding upon both parties, and no new agreement could be engrafted upon it, without a new consideration. To make a contract binding, the consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made; but here there was merely a gratuitous undertaking on the part of the plaintiffs in error to comply with the wishes of the defendant in error. Suppose, that McGran, in his letter of the 20th of April, had written to the Messrs. Brown, that he had become dissatisfied with their conduct as his factors, and requested them, upon the receipt of his letter, to deliver the cotton to some other agent named by him, and that the Messrs. Brown had replied, that they had received his letter, and noted his wishes accordingly. Could it be, for a moment, contended that upon the strength of this supposed assent, McGran could sustain an action of trover against the plaintiffs in error for the cotton, without paying the amount of their advances? But if the assent of the plaintiffs in error in the case at bar, was sufficient entirely to destroy their rights over the cotton in question, there is no reason why it should not do so in the case supposed.

2. But it is contended, that the court erred in instructing the jury that the measure of damages was the difference between the price for which the cotton was sold, and that which could have been obtained at any time from the day of sale to the period when the bill arrived at maturity. The cotton was sold June 3d. On the same day, the bill was accepted, and became due August 5th. But McGran had, as he alleges, by his letter of April 20th, forbidden the Messrs. Brown to sell, and his next letter, authorizing them to sell upon its being received, was not received until August 23d. If, then, the plaintiffs were bound by his instructions, they were not authorized to sell until August 23d; and the damage, if any, sustained by him, is for their not selling on or after that day. But there is no evidence in the case to show *488] what was the price of cotton on or after that day, and therefore, it does not appear that McGran had sustained any damage whatever. The relation of principal and agent is governed by the general rules of the law, founded on reason; and if the principal suffers through the remissness or negligence of the agent, the actual loss sustained by the principal, in consequence of such misconduct, is the standard by which his damages must be measured. *Hamilton v. Cunningham*, 2 Brock. 366.

3. It is also contended, that the court erred in instructing the jury, that if they found from the evidence in the cause, that cottons were selling for a higher price from the 3d June 1833, when the draft was accepted, and when the cotton was sold, until the time when the draft was mature and payable, and if the evidence in the cause ascertains, at any time before the maturity of the draft, what such higher price was, and that the cotton belonging to the defendant in error could have been sold for such higher price, that then the defendant in error was entitled to recover from the plaintiffs in error the difference in price between the sum for which the plaintiffs in error sold the cotton of defendant in error, and the sum for which it might have been

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sold, before or at the maturity of the draft, without making it necessary for them to find any other fact. This instruction is entirely independent of, and unconnected with, the preceding instructions of the court. Upon finding simply the facts mentioned in it, the jury were told, that they must bring in a verdict for the defendant in error, without reference to any of the other important facts proved in the case. This instruction was calculated to mislead the jury, and is therefore erroneous. *Gist v. Cockey*, 7 Har. & Johns. 141.

Jones, for the defendant, denied that the acceptance of a draft, drawn by the owner or consignor against goods shipped to the factor, gives a right to the factor to sell the goods, before the draft is payable. He cited, 6 Barn. & Cres. 38; 1 Camp. 410; 2 Stark. 272; 2 Saund. Plead. and Evid. 641. He contended, that the letter of the plaintiffs in error, of the 24th May 1833, in answer to the letter of Thomas McGran, of the 20th of April 1833, in which they say, "your wishes in respect to the cotton we now hold on your account, are noted accordingly," was a contract not to sell the cotton, until further instructions from the owner of the same. That it amounted to an unequivocal accession, in terms, to the order of the 20th of April, and to the clearest implication to abide by it. Yet, on the 23d June, when the time had arrived when the duties on cotton were reduced, a period when the prices of cotton would increase, and before the effects of that, and other concurring causes of a rapidly increasing demand, and proportional advance of prices, could be fairly developed, they forced his cotton into market, in the *teeth of his order, and of their unqualified accession to its terms, only ten days before. Cotton continued to [*489 advance in the Liverpool market after the sale; and at the time the plaintiffs in error were authorized by the subsequent letter of Thomas McGran to make sales, it had risen to a price which fully authorized the verdict of the jury.

But there was no occasion, nor was there any right, to sell the cotton shipped by the defendant in error, for the purpose of reimbursement, until the acceptance of the bill drawn in New York should be matured. No advances in cash had been made by the house in New York, and nothing had been paid by the house in Liverpool. The whole accommodation afforded to the shipper of the cotton was mere paper facilities, by acceptances in New York; and when those acceptances became due, by a draft on Liverpool.

Mr. Jones considered that the proper test of the amount of the damages to which the defendant was entitled, was that which, under the instructions of the circuit court, had been adopted by the jury. The evidence showed the rise of the price of cotton, and as the plaintiffs in error were bound to keep it, after their receipt of the letter of the 20th of April, the prices, until the draft was paid, should be considered as those to which the owner of the cotton was entitled. He argued: 1. That as to the instructions rejected by the court, they were both in form and substance, in all their premises, and in all their conclusions, utterly inadmissible. 2. That the instructions actually given by the court to the jury, so far from supplying any cause of complaint, were even more favorable to defendants than any they were strictly entitled to ask, and in all other respects unexceptionable.

Brown, in reply.—The argument of the learned counsel for the defend-

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ant in error proceeds upon the ground, that the plaintiffs in error had a mere lien on the cotton in question, which could be waived by such an assent as is supposed to be implied by their letter of May 24th. But the authorities cited show, that factors, under the circumstances existing in this case, have something more than a naked lien ; they have a special property in the thing itself—a power of sale, coupled with an interest ; and such a right cannot be waived, without at least an intention to do so being clearly and unequivocally expressed.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the district of Georgia, rendered in an action in which McGran, the defendant in error, was originally plaintiff. In the spring of 1833, McGran, a merchant in Georgia, shipped two hundred bales of cotton, consigned to the plaintiffs in error, a house of trade in Liverpool, England, there doing business under the firm of William and *490] James Brown & Company, for sale on *his account. The shipment was made under an arrangement with the house of Brown, Brothers & Company, of New York, composed (as seems admitted) either wholly or in part of the partners in the Liverpool house, by which the New York house accepted a draft drawn upon them by McGran for \$9000, the invoice value of the cotton being only \$9151.77 ; and were to reimburse themselves by a draft on the Liverpool house. Accordingly, the New York house, on the 12th of March 1833, addressed a letter to the Liverpool house, in which they state : “ We inclose a bill of lading for two hundred bales of cotton, shipped by McLoskey, Hagar & Company, of Mobile, *per* ship Mary and Harriet, on account of Mr. Thomas McGran, of Augusta, on which you will please effect insurance. This cotton cost, per invoice, \$9151.77. We have accepted Mr. McGran’s draft against this cotton, for \$9000, for which we shall draw on you for our reimbursement, when it matures. In handing this draft for acceptance, Mr. McGran says, he would not have drawn for so large an advance, were it not that there is a balance at his credit with you, which has accumulated within the past two years ; so that if this should not produce enough to meet the advance, it will be covered by what is at his credit.” The existence of any such balance was utterly denied at the trial ; and the Liverpool house contended, that there was a balance the other way.

The cotton duly arrived at Liverpool, on or about the 9th of April 1833. The New York house drew on the Liverpool house for their reimbursement, a bill dated the 7th of May 1833, for 1871*l.* 0*s.* 9*d.*, at sixty days’ sight, being the amount of the advance ; and that bill was accepted by the Liverpool house, on the 3d of June 1833, and became payable, and was paid, on the 5th of August following. On the 3d of June 1833, the very day of the acceptance, the Liverpool house sold the 200 bales of cotton (the market then being on the rise), on a credit, for the nett sum of 2073*l.* 4*s.* 6*d.* After deducting the charges (which amounted to nearly twenty-five per cent.), which became due and payable on the 16th of September 1833 ; and according to an account-current rendered to McGran, by the Liverpool house, on the 29th of June 1833, the whole transactions between the parties, including the sale of this cotton, left a balance of 392*l.* 15*s.* 8*d.*, due to McGran.

At the time when the shipment was made, and the advance arranged

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therefor, no instructions were given by McGran, touching the sale of the cotton. It accordingly went to the consignees, as factors for sale, the advances having been, as above mentioned, without any other contract than that implied by law as between a principal and a factor making advances ; that is to say, that the factor is to make *sale of the goods consigned [491 to him, according to his own judgment, in the exercise of a sound discretion as to the time and mode of sale, having regard to the usages of trade at the place of sale ; and to reimburse himself out of the proceeds for his advances, and other balance due him.

After the shipment and advance were so made, viz., on the 20th April 1833, McGran addressed a letter to the Liverpool house, in which, after acknowledging the receipt of letters of the 4th and 5th of March, from them, he added : "If you have any cottons on hand, when this reaches you, in which I am interested, I wish you to hold them until you hear from me again." The Liverpool house, in a reply to this letter, on the 24th of May 1833, used the following language : "We are in possession of your esteemed favor of the 20th ultimo, and your wishes in respect to the cotton we now hold on your account, are noted accordingly." At this time, by advices received from other correspondents, the Liverpool house were in possession of information that, at least as early as the 8th of April 1833, McGran had failed in business. On the 22d of July 1833, McGran wrote a letter to the Liverpool house, acknowledging the receipt of their letter of the 24th of May, in which he says : "I have your favor of the 31st (the 24th) of May, and note the contents. You will please sell two hundred bales of cotton, soon after the receipt of this, unless you are of opinion you can do better by holding a little longer." This letter was received by the Liverpool house, on or about the 23d day of August 1833. On the 7th of June 1833, the Liverpool house informed McGran of the sale of the cotton ; and in a letter, under date of the 30th of July 1833, in reply thereto, McGran expressed his surprise at the sale ; and added, "I beg leave to refer you to my letter of the 20th of April last, the receipt of which you have acknowledged, instructing you not to sell any cottons you had on hand, in which I am interested, until you heard from me again. Why did you sacrifice my cottons, as the draft drawn by Brown, Brothers & Company, at sixty days, on account of these cottons, could not have been accepted more than a day or two before, as it went forward by the packet of the 8th of May ? Therefore, you had sixty days before you had any money to pay for me." And after some other remarks in the style of complaint, he adds, "You will please take notice, that I do not recognise the sale, and do not consider you authorized to sell the cotton, before the time the draft drawn on you by Brown, Brothers & Company against this cotton falls due. If the price is higher on that day than the day you sold it, I will expect you to allow the difference ; and if it is lower, I will be prepared to pay you any balance I may owe you." To this letter, the Liverpool house replied, by a letter dated the 4th of September 1833, in which they vindicated their conduct, and among other things said : "We beg you to bear in mind, that there was a balance due us from you, on joint transaction from Mr. Clarke ; that the two hundred *bales in question were sold after the market had advanced one-half penny per pound, and that it barely squares the account. You had, [492 unfortunately, been obliged to stop payment. We had the opportunity of

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paying ourselves, by selling your cotton in a brisk market, to a profit of ten per cent. ; and we ask whether it was reasonable, under such circumstances, to expect us to hold the cotton for the chance of further profit, when the loss, if any, was certain to fall on us, and the profit not likely to go to you, but to your creditors, as was supposed, of whom we knew nothing. This would have been the extreme of injustice towards ourselves and our absent partners, without being any advantage to you." And after some other remarks vindicating their conduct, they further said, " We think you must admit, that situated as you then were, you could not reasonably have expected us to hold the cotton, without pointing out in what manner we should be indemnified in event of loss thereby. That Brown, Brothers & Company's draft was not due, does not alter the case. We had become responsible, some months before, by Brown, Brothers & Company's acceptance of the draft of the shippers."

Here the correspondence between the parties seems to have closed. The present action was brought to recover damages against the Liverpool house, for a supposed breach of orders, and of their duty as factors. At the trial, there was an account-current between the parties, and other evidence before the jury ; the whole evidence in the case, however, was introduced by McGran. Among other questions before the jury, were the following : whether the advance made by the New York house, was in effect, an advance by the Liverpool house, either as agents, or as partners in the latter ? whether there was any balance due to the Liverpool house upon the former transaction ? whether McGran was insolvent or not, according to the advances received by the Liverpool house ? and whether under the circumstances disclosed in the evidence, the Liverpool house had a right to sell the two hundred bales of cotton for their reimbursement, notwithstanding the wishes or orders contained in the letter of the 20th of April ?

The jury, at the trial, found a verdict for the plaintiff (McGran), for \$4978.57, under certain instructions given by the court, upon which verdict judgment was accordingly rendered ; and a bill of exceptions having been taken by the original defendants, the cause now comes before us for revision, upon the points made and instructions given at the trial.

The counsel for the defendants asked the court to instruct the jury :
1. That the advance by the house of Brown, in New York, was, in effect, an advance by the house in Liverpool ; and after the advance so made, the shipper had no right to alter the instructions which were given at the time of such advance. 2. That the house in Liverpool having advanced so large an amount on this cotton, having a previous unsettled claim against the shipper, *493] and the *shipper having afterwards, and before the sale of the cotton, become insolvent, the house in Liverpool had a right to sell for their reimbursement, notwithstanding the subsequent orders of the shipper. The court refused to give these instructions ; and, in our judgment, with great propriety ; as each of them involved matters of fact in controversy before the jury upon which it was exclusively their province to decide. If the defendants meant to draw from the court an opinion in point of law upon the assumed facts, the proper mode would have been to have asked the court to instruct the jury, that if they found the facts to be as thus assumed, then that the law was as these instructions stated.

The court then proceeded to instruct the jury, that if they found from

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the evidence in the cause, that the plaintiff had given instructions to the defendants, by his letter of the 20th of April 1833, not to sell any cottons which the defendants might have on hand when that letter reached them, in which the plaintiff was interested, until the defendants heard from him again; and that such instructions were received and recognised by the defendants, by the evidence in the cause, and particularly, by a letter given in evidence as one from the defendants to the plaintiff, dated the 24th of May 1833, in reply to the plaintiff's letter to them of the 20th of April 1833; that then the defendants were not justifiable in law in the sale of the 3d of June 1833, on account of the defendants having on that day accepted Brown, Brothers & Company's draft for 1871*l.* 0*s.* 9*d.*, dated the 7th of May 1833, at sixty days' sight. It is observable, that this instruction is given in absolute terms, without reference to any other facts in the cause which might be found by the jury, upon the evidence before them; and therefore, must be deemed to apply to every posture of the facts which the evidence might warrant. It must, therefore, be deemed to apply to the case, although the advance was originally made by the New York house for and on account of the Liverpool house, as agents or partners thereof; or the Liverpool house had entered into engagements, prior to the advance, to become responsible for the reimbursement thereof to the New York house, in the manner stated in the evidence; and although the plaintiff was, before the writing of the letters, actually insolvent, and had failed in business; and that fact was known to the defendants.

One objection taken to this instruction is, that it leaves to the jury the construction of the language of the letters of the 20th of April, and 24th of May. It is certainly true, as a general rule, that the interpretation of written instruments properly belongs to the court, and not to the jury. But there certainly are cases, in which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury, for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, *where the real objects, and intentions, and agreements of the parties, are often to be arrived at only by allusions to circumstances [*494] which are but imperfectly developed. The present case sufficiently illustrates the distinction. McGran, in the letter of the 20th of April, says, that he wishes the defendants to hold any cottons on hand, until they hear from him again. Now, this language, certainly, ordinarily imports only a desire, and not an order; and yet there can be no reasonable doubt, that under particular circumstances, a wish expressed by a consignor to a factor may amount to a positive command. So, in the reply of the 24th of May, the defendants say, "your wishes in respect to the cotton we now hold on your account, are noted accordingly." Here again, the point is open, whether the language imports that the defendants construed the wishes of the plaintiff to be simply a strong expression of desire or opinion, or a positive order; and also, whether the words "noted accordingly," import that the defendants took notice thereof, or took notice of, and assented to obey, the wishes or order of the plaintiff. The language is susceptible of either interpretation, according to circumstances.

If the case had been one of simple consignment, without any interest in

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the consignee, or any advance or liability incurred on account thereof, the wishes might fairly be presumed to be orders; and the noting the wishes, accordingly, an assent to follow them. But very different considerations might apply, where the consignment should be, as the present is, one clothed with a special interest and a special property, founded upon advances and liabilities. We think, therefore, that this objection is not, under the circumstances of the case, maintainable. It would be quite another question, whether the court might not, in its discretion, have assumed upon itself the right and duty of construing these letters. There is no novelty in this doctrine. It will be found recognised in *Ekins v. Macklish*, Ambl. 184-5; *Lucas v. Groning*, 7 Taunt. 164; and *Rees v. Warwick*, 2 Barn. & Ald. 113, 115.

But the main objection to the instruction is of a more broad and comprehensive character. The instruction, in effect, decides, that in the case of a general consignment of goods to a factor for sale, in the exercise of his own discretion, as to the time and manner of sale, the consignor has a right, by subsequent orders, to suspend or postpone the sale, at his pleasure; notwithstanding the factor has, in consideration of such general consignment, already made advances, or incurred liabilities for the consignor, at his request, trusting to the fund for his due reimbursement. We are of opinion, that this doctrine is not maintainable in point of law. We understand the true doctrine on this subject to be this: whenever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders; this arises from the ordinary relation of principal and agent. If, however, the factor *makes advances, or incurs liabilities on account of the
 *495] consignment, by which he acquires a special property therein; then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities; unless there be some existing agreement between himself and the consignor, which controls or varies this right. Thus, for example, if, contemporaneously with the consignment and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case, the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse his advances or liabilities, until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factors. And in no case will the factor be at liberty to sell the consignment, contrary to the orders of the consignor, although he has made advances, or incurred liabilities thereon, if the consignor stands ready, and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors, to sell in the exercise of a sound discretion, at such time

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and in such mode as the usage of trade and his general duty require ; and to reimburse himself for his advances and liabilities, out of the proceeds of the sale ; and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities. Of course, this right of the factor to sell to reimburse himself for his advances and liabilities, applies with stronger force to cases where the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity.

Such then being the relative rights and duties of the parties, we are of opinion, that the instruction given to the jury by the learned judge in the circuit court, is not maintainable in point of law. The consignment was general to the Liverpool house, for sale ; the advances and liabilities were contemporaneous with the consignment ; there were no contemporaneous orders, limiting or qualifying the general rights of the factors, resulting from these circumstances ; the consignor, subsequently, either failed in business, or was believed to have failed ; the wishes subsequently expressed by the letter of the 20th of April, even admitting them to have the force of orders, were unaccompanied with any other means of indemnity, or even with any offer of reimbursement of the advances or liabilities. Unless, then, upon the established principles of law, the consignor had a *clear [*496 right to control the sale of the consignment, by any orders which he might, in his discretion, choose to give, notwithstanding such advances and liabilities (which, we are of opinion, he had not), the instruction was erroneous. We have not thought it necessary to enter upon any general examination of the authorities which support the doctrines which have been thus stated by us. But the opinion of Lord Chief Justice GIBBS, in *Pothonier v. Dawson*, Holt. 383, and the opinions of the judges in *Graham v. Dyster*, 6 Maule & Selw. 1, 4, 5, will be found fully to recognise some of the leading principles.

Another instruction was given by the court to the jury upon the question of damages, supposing the Liverpool house, by the sale, had violated their proper duty. It was, that if the jury found, from the evidence in the cause, that cottons were selling for a higher price, from the 3d of June 1833, when the draft was accepted, and when the cotton was sold, until the time when the said draft was mature and payable, and if the evidence in the cause ascertained, at any time before the maturity of the draft, what such higher price was, and that the cotton belonging to the plaintiff could have been sold for such higher price ; then the plaintiff was entitled to recover from the defendants the difference in price between the sum for which the defendants sold the cotton, and the sum at which it might have been sold, before or at the maturity of the draft. This instruction was, doubtless, framed, upon the ground, that this was the claim of damages which the plaintiff asserted by his letter of the 30th of July 1833. But as that letter was not assented to, or the claim recognised by the defendants, this claim could, in no just sense, be obligatory upon them ; and as a general rule of law, applicable to damages, under like circumstances, we think that it cannot be maintained. Supposing the sale made by the defendants on the 3d of June to have been tortious, and in violation of orders, the plaintiff had his

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election either to claim damages for the value of the cotton on that day, as a case of tortious conversion, or for the value of the cotton on the 23d of August following, when the letter of the plaintiff of the 22d of July was received, which authorized a sale. If the price of cotton was higher on that day, than at any intermediate period, he was entitled to the benefit thereof. If, on the other hand, the price was then lower, he could not justly be said to be damnified to any extent beyond what he would lose by the difference of the price of cotton on the 3d of June, and the price on the 23d of August.

For these reasons, we are of opinion, that both the instructions given by the circuit court to the jury were erroneous; and therefore, the judgment ought to be reversed, and the cause remanded, with instructions to the court to award a *venire facias de novo*.

WAYNE, Justice, and CATRON, Justice, dissented.

Judgment reversed.

*497] *SUSAN DECATUR, Plaintiff in error, v. JAMES K. PAULDING,
Secretary of the Navy, Defendant in error.

Pensions.—Mandamus.—Heads of departments.

On the 3d of March 1837, congress passed an act giving to the widow of any officer who had died in the naval service of the United States authority to receive, out of the navy pension fund, half the monthly pay to which the deceased officer would have been entitled, under the acts regulating the pay in the navy, in force on the 1st day of January 1835; on the same day, a resolution was adopted by congress, giving to Mrs. Decatur, widow of Captain Stephen Decatur, a pension for five years, out of the navy pension fund, and in conformity with the act of 30th June 1834, and the arrearages of the half-pay of a post-captain, from the death of Commodore Decatur to the 30th June 1834; the arrearages to be vested in trust for her by the secretary of the treasury. The pension and arrearages, under the act of 3d March 1837, were paid to Mrs. Decatur, on her application to Mr. Dickerson, the secretary of the navy, under a protest by her, that by receiving the same she did not prejudice her claim under the resolution of the same date; she applied to the secretary of the navy for the pension and arrears, under the resolution, which were refused by him; afterwards, she applied to Mr. Paulding, who succeeded Mr. Dickerson as secretary of the navy, for the pension and arrears, which were refused by him. The circuit court of the county of Washington, in the district of Columbia, refused to grant a *mandamus* to the secretary of the navy, commanding him to pay the arrears, and to allow the pension under the resolution of March 3d, 1837: *Held*, that the judgment of the circuit court was correct.

In the case of *Kendall v. United States*, 12 Pet. 527, it was decided by the supreme court, that the circuit court of Washington county, for the district of Columbia, has the power to issue a *mandamus* to an officer of the federal government, commanding him to do a ministerial act.

In general, the official duties of the head of one of the executive departments, whether imposed by act of congress or by resolution, are not mere ministerial duties; the head of an executive department of the government in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; he must exercise his judgment in expounding the laws and resolutions of congress, under which he is, from time to time, required to act; if he doubts, he has a right to call on the attorney-general to assist him with his counsel; and it would be difficult to imagine, why a legal adviser was provided by law for the heads of departments, as well as for the president, unless their duties were regarded as executive, in which judgment and discretion were to be exercised.

If a suit should come before the supreme court, which involved the construction of any of the laws imposing duties on the heads of the executive departments, the court certainly would not be bound to adopt the construction given by the head of a department; and if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But the judgment of the court upon the construction of a law, must be given in a case in which they have jurisdiction; and in which it is their duty to interpret the act of congress, in order to ascer-

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tain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment, in any case where the law authorized him to exercise his discretion or judgment; nor can it, by *mandamus*, act directly upon the officer, or guide and control his judgment or discretion, in the matters committed to his care, in the ordinary discharge of his official duties; the interference of the court with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and this power was never intended to be given to them.¹

The principles stated and decided in the case of *Kendall v. United States*, 12 Pet. 610, 614, relative to the exercise of jurisdiction by the circuit court of the district of Columbia, where the acts of officers of the executive departments of the United States may be inquired into, for the purpose of directing a *mandamus* to such officers, affirmed.

*ERROR to the Circuit Court of the District of Columbia, and [498 county of Washington. On the 3d of March 1837, an act was passed by congress, giving to the widow of any officer who had died in the naval service of the United States, out of the navy pension fund, half the monthly pay to which the deceased officer had been entitled to receive under the laws in force on the 1st day of January 1835; the half-pay to commence from the death of such officer; the pension so allowed, to cease on the intermarriage or death of the widow, &c. On the same 3d of March 1837, a resolution was passed by congress, "granting a pension to Susan Decatur, widow of the late Stephen Decatur." The resolution directed that Mrs. Susan Decatur be paid from the navy pension fund, a pension, for five years, commencing from the 30th June 1834, in conformity with the provisions "of the act concerning naval pensions and the navy pension fund, passed 30th June 1834, and that she be allowed from said fund the arrearages of the half-pay of a post-captain, from the death of Commodore Decatur, to the 30th of June 1834, together with the pension hereby allowed her; and that the arrearage of said pension be invested in the secretary of the treasury in trust for the use of the said Susan Decatur; provided that the said pension shall cease on the death or marriage of the said Susan Decatur."

Under the law of March 3d, 1837, Mrs. Decatur applied to Mahlon Dickerson, Esq., then secretary of the navy, and trustee of the navy pension fund, and received out of the navy pension fund the whole amount of the pension, which, as the widow of Commodore Decatur, she was entitled to by the provisions of the law. This was received by her, under a reservation of her rights under the resolution of the 3d of March 1837; she, at the same time, claiming the benefit of that resolution. Mr. Dickerson, the secretary of the navy, referred the question whether Mrs. Decatur was entitled to both pensions, to the attorney-general of the United States; and he decided, that she might make her election to receive either pension, but that she was not entitled to both. On the retirement of Mr. Dickerson from the navy department, he was succeeded by Mr. Paulding, the defendant in error. In the autumn of 1838, Mrs. Decatur applied to Mr. Paulding, requiring him, as the trustee of the navy pension fund, to pay the sum claimed to be due to her under the resolution of congress of March 3d, 1837, stated in an amended petition filed in the circuit court to be \$18,597, with interest on the same. It was stated, that there were ample funds and money of the navy pension fund to pay the amount claimed. The secretary of the navy refused to

¹ S. P. *Brashear v. Mason*, 5 How. 101; *United States v. Seaman*, 17 Id. 230; *United States v. Guthrie*, Id. 304; *United States v. The Com-* missioner, 5 Wall. 563; *McElrath v. McIntosh*, 11 Law Rep. 399; *Ex parte Reeside*, Id. 448.

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comply with this demand ; and on the 25th November 1837, Mrs. Decatur applied by petition to the circuit court of the county of Washington, setting forth all *the circumstances of the case, and asking from the court a *499] writ of *mandamus*, "to be directed to the said James K. Paulding, secretary of the navy of the United States, commanding him, that he shall fully comply with, obey and execute the aforesaid resolution of congress, of the 3d of March 1837, by paying to your petitioner and to the secretary of the treasury, in manner and form as said act or resolution provides, or as your honors shall thing proper, the full and entire amount of the aforesaid sum or sums of money, with interest thereon, or such part or portion thereof as your honors may direct."

The circuit court granted a rule on the secretary of the navy to show cause why the writ of *mandamus*, as prayed for, should not be issued ; and to this rule the secretary made the following return : To the honorable the judges of the circuit court of the district of Columbia, for Washington county. The undersigned, James K. Paulding, secretary of the navy of the United States, respectfully states : That he hath been served with notice of an order or rule from this honorable court, requiring him to show cause why a writ of *mandamus* should not be issued from the said court, directed to him as secretary of the navy of the United States, upon the petition of Mrs. Susan Decatur, commanding him to pay certain sums of money out of the navy pension fund, claimed by said petitioner to be due to her under a certain resolution of congress referred to in the aforesaid petition. The undersigned considers it his duty, in the first place, to protest against the jurisdiction of the circuit court invoked on this occasion for the following reasons :

1. Because, as secretary of the navy of the United States, he is not subject, in the discharge of the duties of his office, by the constitution and laws of the United States, to the control, supervision and direction of the said court.

2. Because, as such secretary, he is by law constituted the trustee of the navy pension fund, and it is made his duty, as such, "to receive applications for pensions, and to grant the same, according to the terms of the acts of congress in such cases provided." He is also required to cause books to be opened, and regular accounts to be kept, showing the condition of the navy and privateer pension funds, the receipts and expenditures thereof, the names of the pensioners, and the dates and amount of their respective pensions, with a statement of the act or acts of congress under which the same may be granted ; and he shall annually report to congress an abstract showing the condition of these funds in all these particulars, and the receipts and expenditures during the year ; and there is no law authorizing the circuit court of this district to control and direct him in the discharge of these duties.

3. Because such jurisdiction in this court would, if assumed, operate as such an interference with the discharge of the official *duties of the undersigned, as to make it impossible for him to perform them as required and intended, and would transfer to the said court the discharge of the said duties, and the whole management and disposition of the said fund, and subject all applicants for pensions to the delay, expense and embarrassments of legal controversies as to their rights, and to a suspension of the

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provisions to which they might be entitled under the laws, till these controversies were judicially decided.

4. Because such a jurisdiction in the circuit court would make the United States suable in that court ; and subject the money of the United States, in the treasury of the United States, to be taken therefrom by the judgments of said court.

5. Because, if the circuit court assumes the jurisdiction of compelling the secretary of the navy, or the head of any other department, to revise and reverse the decisions that may have been made by their predecessors in office, these officers will necessarily be taken off from the discharge of their immediate and most urgent public duties, and made to apply their time and attention, and that of their clerks in the departments, in an endless review and reconsideration of antiquated claims and settled questions, to the delay and hinderance of measures of vital importance to the national welfare and safety. For these and other reasons, which he trusts will be obvious, on further consideration, to the court, he respectfully objects to the jurisdiction assumed in this case ; and will now proceed, under such protest, to show cause why the *mandamus* prayed for should not be issued.

The undersigned was somewhat surprised to see it stated in the petition of the relatrix, that "he had been often requested by her to pay the two several sums of money stated in the petition, amounting to the aggregate sum of \$23,422.25 ;" and that he had refused so to do ; and, that "he pretended to say that the petitioner was not entitled to the same, or any part thereof." The undersigned has no recollection of ever having refused the payment of any sum, or any sums of money demanded in behalf of Mrs. Decatur, except so far as this may have been inferred from his declining to reconsider her claim, on grounds which he will now proceed to state.

Sometime in September 1838, the undersigned received a communication from the counsel of Mrs. Decatur, informing him that they had examined the documents connected with her claims, and the opinion of the late attorney-general, Mr. Butler, upon the strength of which the claim appeared to have been disallowed by his predecessor, and that they were satisfied, that the decision which had been made was not warranted by law. A reconsideration of the case was then asked of the undersigned, "if he felt himself at liberty to revise the decision of his predecessor." And if this could not be complied with, he was then asked "to give such instructions to the district-attorney as will enable him to concur with them in bringing the subject before a competent tribunal, in order to obtain a judicial decision upon the case." To this application, the undersigned replied, "that the claim having been examined and decided by his predecessor, in conformity with the opinion of the late attorney-general, he did not feel himself authorized to disturb that decision, as no new facts had been adduced to call for a re-examination." And further, that he also declined the second proposition of the counsel ; "being unwilling to give a precedent, which, if once established, will place every executive officer of the government in the attitude of a defendant, in all cases where individuals are dissatisfied with his decisions." After this reply, no further application was made to the undersigned ; but in February last, a memorial was presented to the president of the United States, in behalf of the claimant, by her counsel, in which a reconsideration of the case and his interference were requested, and that

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"if he should be of opinion, that the claim was lawful and proper to be allowed, that he would direct the secretary of the navy to execute the resolution in favor of the claimant, without further delay." In this memorial, the opinion of the late attorney-general, and the decision of the late secretary of the navy were stated; and it was added, that "the claim had been recently renewed before the present secretary of the navy, and again rejected, not upon a consideration of its merits, but because it had been before acted upon and denied, and no new matter shown upon the new application." On this memorial, the president decided, that "he did not find in the papers submitted to him, sufficient to justify the interference asked for;" and of this the counsel for the claimant was informed.

The undersigned has been thus particular, for the purpose of showing distinctly the nature of the application, and its refusal. He desires it should be seen, that he placed this refusal solely upon the ground that his predecessor had decided it, after a full consideration, and after calling for the official opinion of the attorney-general, and that no new facts were adduced to authorize him to reconsider it; and he desires now that this shall be considered by the court as a distinct ground of objection to the relief now prayed for. He presumes, that even if the court shall decide that it possesses the jurisdiction claimed, it will not consider that it is bound to exercise it, in all cases, and under all circumstances; and that after a claim has been heard and rejected by the officer authorized to decide upon it, it still remains in the power of the claimant to call it up, and compel a reconsideration of it from every successive officer, who may be subsequently appointed in the place of the officer making the decision. It is obvious, that if such a course is allowed, there can be no such thing as the final decision of a controverted claim. The executive officers must always continue to consider it as an *open claim, and the funds of the government as still liable to its demands. Nor is it possible for the affairs of the government to be properly administered, if the executive officers, instead of devoting themselves to the discharge of the duties brought before them, and which are abundantly sufficient to occupy all their time and attention, are to be called upon to go back to the times of their predecessors, and determine whether they have properly discharged the duties they were required to execute.

These considerations, and an experience of the impossibility of thus conducting the public business committed to them, have long since obliged all the executive departments, under every administration, with the sanction, as the undersigned believes, of several successive attorneys-general, to adopt the rule, that no claim once fully heard and rejected by the competent officer can be considered open to the review and reconsideration of the successor to such officer, unless new matter can be shown to justify such re-examination. It is evidently as important to the public interests, if the courts shall be considered as invested with the jurisdiction claimed on this occasion, that they should respect this rule. The inconveniences resulting from disregarding it by the courts, in the exercise of such a jurisdiction, are the same. The same unsettled state of controverted claims, the same uncertainty as to the national funds, kept open to rejected demands, which may interfere with the rights of other claimants and with the public interests, and the same misemployment of the time and attention of the public officers

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to cases already decided by their predecessors, must continually occur ; for, although the decision is ultimately made by the court, yet the officer to whom the command is to be directed must examine the case and everything connected with it, so as to present it to the consideration of the court. Indeed, much more of his time and attention may be withdrawn from the immediate duties of his station, by his being called to answer before a judicial tribunal on such occasions, and make that defence against the proceedings which he may feel bound to do, than by a reconsideration of the claim.

Under such circumstances, it has been heretofore thought necessary by claimants whose demands have been rejected, and who were dissatisfied with such rejection, to make their application to congress ; and where it has been thought reasonable and just by the legislature, that their claims should be allowed, acts have passed for their allowance, or the accounting officers have been authorized to open and reconsider their claims. And it appears to the undersigned, that there would be a peculiar propriety in seeking that mode of redress, in relation to the present claim, which arises from the circumstance of there being two legislative enactments of the same date, making nearly similar provisions for the claimant, and the question being whether she is entitled to one or both of these *provisions. The decision of that question by the late secretary of the navy, and the [*503 opinion of the attorney-general, upon which it is founded, are herewith presented to the court.

The undersigned observes, that a specific sum is stated in the petition as being the amount of the pension claimed. He has already stated, that no sum was stated in the application made to him. It appears from the amount stated, that the petitioner claims not only half the pay to which the deceased was entitled, but half the pay and rations, or pay and emoluments. This will present to the court, in case they should assume the jurisdiction, and decide in favor of the petitioner, a question under the pension laws as to the construction of the words "half the pay" and "half the monthly pay," in those acts of congress. The uniform construction of all these laws, in all the departments of the government, has invariably been such as to confine the pension to the pay proper ; the expression being in all these acts "pay," and not pay and rations, or pay and emoluments. The undersigned is not aware that any claimant of a pension has ever before suggested a different construction.

In conclusion, he admits, in relation to the state of the navy pension fund, that there is at present a sufficient amount to pay the claim of the petitioner, if it was now to be paid. What may be its state when the payment may be ordered, if it should be ordered, it will be impossible for him to state ; inasmuch as it will depend on the number of applicants whose claims may be made and allowed in the meantime. And he thinks it proper to state, that if the payment of the sum stated in the petition shall be commanded by the decision of the court, in consequence of the court's deciding that the pensioners under these acts of congress are entitled to half-pay and rations, or pay and emoluments, of the deceased officers and seamen, then he apprehends the navy pension fund would be greatly insufficient to pay the present claimant and the other pensioners whose claims have been

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allowed, but who have only received half the pay proper, exclusive of rations or emoluments. All which he respectfully submits.

J. K. PAULDING.

OPINION OF THE ATTORNEY-GENERAL.

Attorney-General's Office, April 11th, 1837.

Sir:—I have had the honor to receive your letter of the 15th ult'o, relative to the case of Mrs. Susan Decatur. It is assumed in your statement of the case, that Mrs. Decatur would be entitled to the pension granted by the act of the 3d ultimo, for the equitable administration of the navy pension fund, "were it not for the doubt created by the passage, on the same day, of the joint resolution for her special benefit. And on these two laws, you inquire whether she is entitled under the resolution, or under the act, or under both." This case differs from that of Mrs. Perry, referred to in the note of Mrs. Decatur, accompanying your letter, inasmuch as the law *504] *under which Mrs. Perry ultimately obtained her pension was in existence at the time of his death, at which time she was also entitled (although not then aware of the fact) to its benefits. I held, in her case, that the law granting her an annuity, for such it was called, could not deprive her of the pension given by a pre-existing law; and that as congress were presumed to be acquainted with the laws in force, the legal intendment must be, that the annuity was designed as an additional provision; and consequently, that she was entitled to both. After maturely considering the history of the general and special provisions on which the present case depends, I am of opinion, that but one pension can be allowed; but if the general provision includes the case of Mrs. Decatur, then I am of opinion, she is entitled to take, under that provision, or under the joint resolution, at her election. I am, very respectfully, your ob't serv.

B. F. BUTLER.

The Hon. MAHLON DICKERSON, Secretary of the Navy.

LETTER FROM SECRETARY OF THE NAVY TO MRS. DECATUR.

Navy Department, 14th April 1837.

Dear Madam:—The attorney-general has given his opinion, that in your case but one pension can be allowed; he, however, thinks that you have your selection to take under the general law, or under the resolution in your particular case; as soon as your pleasure upon this subject shall be known, the warrant for pension shall be made out. I am, with great respect and esteem, your ob't h'le s't,

M. DICKERSON.

Mrs. SUSAN DECATUR, Georgetown, D. C.

The circuit court overruled the order to show cause to the secretary of the navy, and refused the application of Mrs. Decatur for a *mandamus*; and this writ of error was prosecuted by her.

The case was argued by *Brent* and *Coxe*, for the plaintiff in error; and by *Gilpin*, Attorney-General of the United States, for the defendant.

Upon the part of the *plaintiff* in error, it was said:—1. That there was error in the refusal in the court below to award the *mandamus*, and it ought to have been granted. 2. That the secretary of the navy, the appellee, was

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bound to execute said resolution, that he had no discretion in so doing. 3d. That the said resolution being clear and explicit as an act of legislation, the said secretary of the navy ought not (acting as he did, ministerially, in carrying it into execution) to refuse to execute the same. *4. That having refused to do the same, the court ought to have issued the [*505 *mandamus*. 5. If there be a doubt upon the laws of congress, whether the relatrix is entitled, that doubt is removed by an examination of the journals and proceedings of congress connected with the claim of the relatrix.

The counsel for the plaintiff, in support of the jurisdiction of the circuit court to issue the *mandamus*, as prayed for, cited *Marbury v. Madison*, 1 Cranch 137; 6 Pet. 241; *Kendall v. United States*, 12 Ibid. 524.

They contended, that it was the intention of congress to give the pension to Mrs. Decatur under the resolution; and also a pension under the general pension law, passed on the same day the resolution was adopted and approved. The pensions, it will be seen, by an examination of the resolution and of the law, are not the same, but are cumulative. Each law is a clear and distinct act of legislation, expressing the will of the legislature, directed to the secretary of the navy, in a ministerial capacity; and he should have obeyed both. He has no right to collate the two laws for the purpose of interpreting them. While acting under the provisions of the pension law, the secretary of the navy may have a discretion, and he is to inquire into facts on which he is to decide; but under the first resolution, giving a pension to Mrs. Decatur, he is to act only ministerially. The history of the proceedings of congress, granting a pension to Mrs. Decatur, by the resolution, and contemporaneously giving pensions to the widows of officers of the navy, shows that the claims of the plaintiff in error are well founded. The allowances are different. The rate of the pension under the resolution, and that given by the law, is different. One is given for five years, and a trustee is to hold the arrears, for the use of Mrs. Decatur. The sum given by the resolution is greater than that given by the pension law. One allows the rations of the captain to form a part of the estimate; the law gives only half of the pay proper. The true construction of the law and resolution will be obtained by a reference to the principles which have been applied to wills giving more than one legacy to the same persons. The courts, in such cases, always adjudged, that when the legacies are distinct and independent, and have no reference to each other, both legacies are payable. Cited, 1 Bro. C. C. 389; 6 Mad. 300, 303; 2 Russ. 272; 1 Coxe 391. When there is a doubt as to the intention of the legislature, the law should be construed favorable to those who claim under it. 6 Dane's Abr. 570.

Gilpin, for the defendant in error.—The navy pension fund was established by the act of 2d March 1799. (1 U. S. Stat. 716.) It was made up from a certain proportion of the sales of prizes, taken by the officers and seamen of *the American navy, the investment of which it provided [*506 for, so as to establish the fund in question. From the time of its establishment, occasional changes were made (2 Ibid. 53, 293, 790; 3 Ibid. 287; 4 Ibid. 572, 714; 5 Ibid. 180) in the organization of the trust, the amount of pension, and the persons entitled to it. In the year 1832, the fund was in the treasury of the United States, in charge of three commissioners, being the secretaries of the navy, war, and treasury departments,

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who were authorized to make the necessary regulations for admitting pensioners and paying pensions ; and the payments to the pensioners were made by warrants drawn in their favor, by the secretary of the navy, on the treasurer of the United States ; every officer, seaman and marine, disabled in the line of his duty, received such pension as the commissioners might allow, not exceeding his full monthly pay ; and the widow of any one killed in service during the late war, or dead of wounds and casualties then received, was to have half his monthly pay, for twenty-five years after his death. On the 10th July 1832 (4 U. S. Stat. 572), the navy pension fund was reorganized ; the commissioners were abolished ; their duties were imposed on the secretary of the navy alone ; and he was to "receive applications for pensions, and grant them according to the terms of the acts of congress ;" but no change was made as to the persons entitled to receive them, or in the amounts. On the 30th June 1834 (Ibid. 714), an act was passed, adding to the persons previously entitled to pensions, "the widows of officers, seamen and marines, who died in the naval service, since 1st January 1824, or who might die by reason of disease, casualties or injuries received while in the line of their duty." This law did not include the widows of those dying in the naval service, previous to that day, although they might have contributed as much to the fund as those who died after it. Such was the case in regard to the plaintiff in error, the widow of the gallant Decatur. In 1830, a special resolution was introduced in congress to grant her half pay for five years from 30th June 1834, which, in the succeeding year, was extended, by adding thereto arrearages of half pay, from her husband's death to the 30th June 1834 (Journal of House of Representatives 336) ; in that shape it passed the house, and was sent to the senate. In the meanwhile, that body had taken up the subject, and had before it a general law to provide for the widows of all officers, seamen and marines similarly situated ; which bill they passed and sent to the house, without adopting the special measure for Mrs. Decatur's relief. The general bill then gave rise to discussion, and it not having passed the day before the close of the session, the senate adopted the special resolution in regard to the plaintiff in error, which was approved by the president. Subsequent to the passage of the special resolution, the general bill was also passed by both houses, and approved by the president, among the last acts at the close of the session. Journal of the Senate, 41, 132, 206, 300, 318, 330, 331, 340. Journal of the House of Representatives 569. *The general law embraced in its provisions the case of Mrs. Decatur, and differed in no respect from the special resolution, except that it extended the pension to her death, instead of limiting it, as the resolution did, to five years.

The application by Mrs. Decatur to Secretary Dickerson, to pay her a double pension, the one under the general act, and the other under the special resolution, was refused, by the advice of the attorney-general ; and she received the sum to which she was entitled under the former, without, however, waiving her claim to the latter. She subsequently applied to Secretary Paulding, the defendant in error, to revise this decision of his predecessor, which he declined to do ; and afterwards to the president, who decided, that, "he did not find in the papers submitted to him, sufficient to justify the interference asked for." Thereupon, Mrs. Decatur applied to the circuit court of this district to issue a *mandamus* to Secretary Paulding, to comply

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with the special resolution, by paying to Mrs. Decatur, and to the secretary of the treasury, in trust for her, the full amount of the arrearages and pension, including therein half the rations, as well as half the monthly pay. The refusal of the court to issue such a *mandamus*, is alleged to be error.

1. It is submitted, that there was no error in this refusal of the court below, because that court was not authorized to issue a *mandamus*, for the purposes prayed for. It is an attempt to compel the secretary of the navy, through the mandate of an inferior and local tribunal, to take from the treasury of the United States a sum raised by the gallantry of men, most of whom are dead, and placed there under his charge, as their trustee, and to appropriate it in a manner contrary to what, in his own judgment, the law sanctions, contrary to the opinion of the attorney-general, and not approved of or sanctioned by the chief executive officer. There must be strong grounds to authorize such an exercise of power, to permit the circuit court of this district thus to compel a public officer to take money from the treasury, when he believes he is forbidden by law so to do, and when he is confirmed in that belief by an officer, whose opinion, he is, by law, to require, in every doubtful case. It effects, in practice, a radical change in the mode of managing and disbursing the public money; it takes, in point of fact, the responsibility of superintending a particular fund from the officer made answerable for it by law, and transfers it to a court of justice; it changes materially the modes of proceeding in relation to the trust; it may delay the payment of numerous pensioners, during the progress of a tedious and complicated litigation; if the power of prohibiting as well as compelling payments to certain pensioners exists (and it results from the same principle), those of whose rights the secretary of the navy, as their trustee, has no doubt, may be forced to contend for them by expensive and protracted law-suits.

Nor is there any usage or principle of law which would sanction such an interference as was sought from, but properly refused *by the circuit court. The secretary of the navy is an executive officer; the cases [*508 in which any court, even one admitted to have the power of issuing a *mandamus*, can control such an officer in the performance of an executive duty, have been fully discussed; this court has examined the subject so as to lay down the rules by which he may be guided; yet in no instance has a case like the preset been sustained by a judicial sanction. The case of *Marbury v. Madison*, 1 Cranch 137, was that of a commission already signed by the president, sealed, and ready for delivery. This court held, that a court having legal authority to issue a *mandamus*, might do so in such a case, because the course prescribed was a precise one, pointed out by law, to be strictly pursued, and "in which there could be no variation." 1 Cranch 158. Apply this test to the duty devolved on the secretary of the navy, as trustee of this fund. Was he bound to pay a certain sum, under all circumstances? Was it a proceeding "which could not be varied," even if the fund was insufficient? Must he not look to the state of the fund—to other existing claims upon it under the laws then in force? Could he pay it out of the fund committed to him, if already exhausted, or if there were other legal claims upon it, made prior to, or at the same time with Mrs. Decatur's, under prior or equal legal sanctions, and it was insufficient to pay all? By this test, it was a proceeding that might, nay, must, of necessity, be varied;

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the exercise of the trustee's discretion was required to examine the state of the fund and the validity of other claims ; and the performance of the required act must depend on, and might be varied by, the result of that examination. Again, this court held, in the same case (1 Cranch 164), that where the secretary of war was directed by an act of congress to place certain designated names on the pension list, his refusal would authorize a *mandamus*. In such a case, the duty of the executive officer is plain ; had congress directed Mrs. Decatur's name to be put on the pension list, it would have prescribed an act merely and strictly ministerial ; but they order him to pay her out of the navy pension fund, of which he is trustee, which he is bound to administer and dispose of according to other existing laws, and to the legal sufficiency of which he must look, whenever he makes a payment. So, when it was held, that the secretary of state might be compelled to deliver a patent which had been duly signed, sealed and recorded (1 Cranch 165), we have a proceeding which could not be varied ; the secretary could do nothing but the act required ; it had no communion with any other act ; but suppose, the patent had not been signed and sealed, and that the secretary was of opinion, that all the necessary pre-requisites had not been complied with ; or suppose, the right of the patentee was limited to a location within a certain designated body of land (as in military bounties), and all the lands therein had been exhausted, could the secretary, in such a case, be compelled to issue and deliver the patent by a writ of *mandamus* ? Again, the court held, in the same case, that an officer might be *compelled to do an

*509] act, peremptorily enjoined, and affecting individual or private rights (1 Cranch 166) ; thus distinguishing such an act from those of a public or political character, or those which affect the rights and interests of various persons. To place a name on the pension list, to deliver his patent to a patentee, to record the commission of a justice of the peace, are acts not of a public concern, but solely affecting the interest of the individual. On these, as the court say, it is "their province to decide ; not to inquire how the executive, or executive officers, perform duties in which they have a discretion." Is the plaintiff in error solely interested in the act which she requires the secretary of the navy to do ? Does it affect her individual rights alone ? Are not other claimants on the fund equally interested ? Is not the executive officer responsible for the correctness of his decision in performing a public trust ? Are not the nation, the public, bound to see that the fund is properly applied, and to make good any deficiency arising from an erroneous payment, even though made under the sanction of the circuit court of this district ? The tests thus established by this court, in the case of *Marbury v. Madison*, exclude the act asked for by the plaintiff in error, from the class of ministerial acts ; they place it clearly among those which are executive, and to a certain extent discretionary.

In the case of *McCluney v. Silliman*, 2 Wheat. 369, a pre-emption claim had been rejected by the register of the land-office, on the ground, that the land belonged to another ; a *mandamus* was refused, because the court held, that they had no controlling power over the officer, in such a case, whatever might be the justice of the applicant's claim ; but that "the parties must be referred to the ordinary mode of obtaining justice, and not resort to the extraordinary one of a *mandamus*." Yet in what respect was the proceed-

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ing asked for in that case, less sustained by law than the present? The case of *Kendall v. United States*, 12 Pet. 610, was, like that of *Marbury v. Madison*, very fully examined; important principles were settled; rules were carefully laid down; and those cases distinguished in which an executive officer would be, and would not be, compelled to act by a *mandamus*. The court said, that to justify such a proceeding, the act required to be done, must be "a mere ministerial act;" the postmaster-general was "to credit" the relators with a certain sum exactly ascertained and reported to him by an officer authorized so to do; the act was precise, definite and purely ministerial; no money whatever was to be paid. All those are points distinguishing the case from the present one, especially the payment of money; here, too, it is to be withdrawn out of a particular fund in the treasury, which, as the officer having it in charge believes, is appropriated to other purposes.

These decisions of this court seem to be sufficient to sustain the judgment of the court below, and they are abundantly sanctioned, if it were necessary to go beyond them, by the opinions of other *tribunals. [510 3 Hall's Law Journ. 128; 5 Binn. 104; 6 Ibid. 9; 1 Whart. 1. They mark with exactness the line between executive and merely ministerial duties; and they place the act which the secretary is now called on to perform, clearly within the former. It is one requiring the exercise of deliberate judgment in the construction of a long series of laws; in a determination between conflicting legal provisions; in ascertaining the rights of different parties, that may seriously interfere with each other, and in apportioning between all an inadequate fund. It is, therefore, in no sense, an act in which a court is authorized to interfere with an executive officer. Much less is it so, when the effect of such interference must be to require a revision of decisions previously made in the most deliberate manner, and to oblige every incumbent of an office, already laborious, to investigate and open anew, without the exhibition of additional facts, subjects that have been already fully and finally decided.

2. But if the act which the secretary of the navy is required to perform were ministerial, and such as a court having competent jurisdiction might compel him to perform; it is yet submitted, that upon the merits the applicant would not be entitled to the relief prayed for. Mrs. Decatur had no right to claim payment under the resolution, having received it under the general law. To make such a double payment out of the navy pension fund, would be a violation of the trust created in the establishment of that fund. It was not raised by congress; it was taken from the sale of prizes captured by the naval officers and seamen. By what right, on what principle of justice, can the widow of one officer receive from that fund twice as much as another? Congress never designed so to violate the principles of justice, or so to appropriate any portion of a fund raised by the services and gallantry of the whole navy. That they could not, is strikingly shown in the instance of their gratuity to the widow of Commodore Perry; she was entitled to her pension from this fund; but when congress resolved, under circumstances of strong sympathy, to add to her compensation, they gave her an annuity "payable out of the treasury;" not a double pension, to be taken from the navy pension fund, to the detriment of those to whom it belonged, according to the terms of the original trust. (6 U. S. Stat. 260.)

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It was evidently the intention of congress, to substitute the general for the special provision ; to give to all the widows of the officers and seamen, the same relative gratuity ; with this object, the special resolution in favor of Mrs. Decatur was withheld till the latest moment ; it was only when it was found that a difference between the two houses might prevent the passage of the general bill, at that session, that the special resolution in her behalf was adopted. This is evinced, by the identity of every provision in the two, except that which prolongs the pension during life. An intention so clearly exhibited must always prevail in construing a statute. *Brown v. Barry*, 3 Dall. 365. But were there a doubt as to the intention to abrogate the special provision by the general law, it would not sanction the *511] assumption that congress meant the latter to apply to the case of Mrs. Decatur, while the former continued in force. It would be more reasonable to suppose, that her claim, having been separately presented, separately discussed, and separately legislated upon, any which she might have had under the general law was extinguished.

In the construction of statutes, where a general legislative provision embraces a special one, it is a substitute for, not an addition to it. The general provision embraces and controls the special one. This arises from two well-established principles in regard to statutes : that all legislative provisions on the same subject are to be taken together ; and that later regulations, if at variance with previous ones, are to control them. It is said by Lord COKE (2 Inst. 13), that earlier clauses in the same statute are to be restrained by those that are subsequent. Where an act provided for the place where treason, committed by particular persons, should be tried, and a subsequent act established the mode of all trials for treason, the latter was held to supersede the former. 11 Co. 63. In *Rex v. Loxdale*, 1 Burr. 447, it is said, that all statutes relating to one subject are to be taken together. When the act of 5 Geo. III. punished "seducing artificers," with three months' imprisonment, and that of 23 Geo. III., with six months, the last was held to supersede the former ; though there was no express repeal. *Rex v. Cator*, 4 Burr. 2026. In *Williams v. Pritchard*, 4 T. R. 2, it is said, that a subsequent act controls a prior one on the same subject. In the *Attorney-General v. Chelsea Waterworks*, Fitzg. 195, it is said, that the latter part of the same statute controls the former part. In *Bywater v. Brandling*, 7 Barn. & Cres. 643, it is said, that statutes are to be so construed as to give effect to the whole, not to separate clauses. In *Gage v. Currier*, 4 Pick. 399, where an act of 1793 gave limited privileges, as to church membership, to a particular town, and an act of 1823 gave general privileges on the same subject to the whole state, the latter was held to supersede the former. Applying these principles, we must admit, that where a pension to the widow of a deceased officer is given, and subsequently thereto, a pension is allowed to all such widows, including by its terms the one for whom the special act was passed, it is to be taken as one general provision.

It is held, that the same rules should govern the construction of statutes as of wills. *Butler and Baker's Case*, 3 Co. 27 ; *Attorney-General v. Chelsea Waterworks*, Fitzg. 195. If so, the principle contended for is clearly established. It cannot be doubted, that if, in a will, an annuity for five years, of a specific sum, payable out of a specific fund, were bequeathed to the plaintiff

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in error, and shortly afterwards, by a codicil, an annuity in all respects similar, except that it was to last for life, were bequeathed to a class of persons of whom the plaintiff was necessarily one, that the latter would be regarded, not as an addition to, but a substitute for, the former. In *St. Albans v. Beauclerk*, 2 Atk. 638, where the same sum *was given to the same person, in two codicils, it was held to be but one legacy; [*512 and that even a greater sum to the same person is only an augmentation, not a second legacy. In *James v. Semmens*, 2 H. Bl. 213, an annuity of the same sum, to the same person, in a will, and afterwards in a codicil, was held to be but one, because made chargeable on the same fund. In *Allen v. Callow*, 3 Ves. 289, a legacy was given to a child named, and by a codicil, the same sum to the children generally; and it was held to be a mere repetition. In *Osborne v. Leeds*, 5 Ves. 384, a legacy to children generally, and a codicil giving the same sum to a particular child, was held to be merely a repetition. In *Dewitt v. Yates*, 10 Johns. 158, a legacy to a grand-daughter, and afterwards one of the same sum to the same person, but payable by a different legatee, was held to be only a substitution. None of these cases are so strongly indicative of the intention to substitute the last for the first provision, as that of Mrs. Decatur.

But if the first provision be not superseded, is it not expressly repealed by the last? The general act provides, that the navy pension fund shall be distributed in a certain manner, and no other; it then repeals all other laws at variance with it. Is not the special act, therefore, repealed? Even if not superseded or repealed, does not the well-established principle apply, that where two modes are given to recover the same thing, one must be chosen? Co. Litt. 145.

On these several grounds, it is submitted, that the plaintiff in error, having received her pension under one law, cannot claim it under the other, for which the former was only a substitute. Even if both were passed intentionally; if congress, on the same day, knowingly passed two distinct acts, relating to the payment of a widow's pension out of the navy pension fund, they can be regarded only as two sections of a single law; the one providing for the person named, the other for all widows. How would the clauses be considered in such a case? The most favorable construction would be, that Mrs. Decatur might take under either—might claim her right to select; that she was to have a special benefit, if she chose under the one section, not being required to offer any evidence to sustain her claim, as others were obliged to do; or that she was to have her pension for life, if she preferred to waive that benefit. The special clause excepted her from the general provisions imposed on all other persons. *Rex v. Armagh*, 8 Mod. 8; *Churchill v. Crease*, 5 Bing. 180; *Torrington v. Hargraves*, Ibid. 492.

3. But again, the circuit court was right in refusing the *mandamus*, because it asked for the payment of a sum under the resolution, which the resolution did not warrant. The plaintiff in error asked a *mandamus* to compel the secretary of the navy to pay her the full and entire amount of the sums of money stated in her petition, which were one-half of the monthly pay of her husband, and also one-half of the daily rations to which he was entitled. The resolution gives her a pension "in conformity with the provisions of the act concerning naval pensions and the navy pension fund, *passed 30th June 1834" (4 U. S. Stat. 714), and also, "the arrear- [*513

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ages of the half-pay of a post-captain." No authority or reason for including the daily rations (the subsistence of an officer or seaman) in his pay, can be shown, either by statute or usage. Uniform construction, from the beginning of the government, has excluded them. This exposition of the law is so strong, that a court of justice would now scarcely change it, even if the language admitted of doubt. 1 Dall. 136, 178-9. The whole current of legislation shows that they are considered as distinct. 1 Story's Laws, 321 502, 514 ; 2 Ibid. 130, 1090, 1210 ; 3 Ibid. 1810. And in the case of *Parker v. United States*, 1 Pet. 297, it evidently appears, that this court regarded the rations of an officer as distinct from his pay.

On these grounds, it is submitted, that it was no error in the circuit court to refuse the *mandamus* which was prayed for. The act of the secretary of the navy, which it was sought to compel, was not such as that tribunal had a right to control ; and if it had been, the payment already received by the plaintiff in error appears to have been all that congress intended her to have, by virtue of the resolution on which she relied. That the generous liberality of the legislature might be justly extended to reward the gallant services of the brave and lamented Decatur, no one can doubt ; but it is not to be supposed, that they desired to effect that object, by an unequal charge upon a fund collected by the gallantry and intended for the benefit of the officers and seamen of the navy in general.

TANEY, Ch. J., delivered the opinion of the court.—This case is brought here by a writ of error, from the judgment of the circuit court of the United States for the district of Columbia, refusing to award a peremptory *mandamus*. The material facts in the case are as follow :

By an act of congress, passed on the 3d of March 1837, the widow of an officer who died in the naval service, became entitled to receive out of the navy pension fund half the monthly pay to which the deceased officer would have been entitled, under the acts regulating the pay of the navy, in force on the 1st day of January 1835 ; the half-pay to commence from the time of the death of such officer ; and upon the death or intermarriage of such widow, to go to the child or children of the officer. On the same day, the following resolution was passed by congress :

No. 2. Resolution granting a pension to Susan Decatur, widow of the late Stephen Decatur.

Resolved, by the senate and house of representatives of the United States of America in congress assembled, that Mrs. Susan Decatur, widow of the late Commodore Stephen Decatur, be paid from the navy pension fund, a pension, for five years, commencing from the 30th day of June 1834, in conformity with the provisions of the act concerning naval pensions *and the navy pension fund, passed the 30th June 1834, and *514] that she be allowed, from said fund, the arrearages of the half-pay of a post-captain, from the death of Commodore Decatur, to the 30th of June 1834, together with the pension hereby allowed her ; and that the arrearage of said pension be vested in the secretary of the treasury, in trust for the use of the said Susan Decatur : provided that the said pension shall cease on the death or marriage of the said Susan Decatur. Approved, March 3, 1837.

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By the act of congress of July 10th, 1832, the secretary of the navy is constituted the trustee of the navy pension fund ; and as such it is made his duty to grant and pay the pensions, according to the terms of the acts of congress.

After the passage of the law and resolution of March 3d, 1837, Mrs. Susan Decatur, the widow of Commodore Decatur, applied to Mahlon Dickerson, then secretary of the navy, to be allowed the half-pay to which she was entitled under the general law above mentioned ; and also the pension and arrearages of half-pay specially provided for her by the resolution passed on the same day. The secretary of the navy, it appears, doubted, whether she was entitled to both, and referred the matter to the attorney-general ; who gave it as his opinion, that Mrs. Decatur was not entitled to both, but that she might take under either, at her election. The secretary thereupon informed her of the opinion of the attorney-general, offering at the same time to pay her under the law, or the resolution, as she might prefer. Mrs. Decatur elected to receive under the law ; but it is admitted by the counsel on both sides, that she did not acquiesce in this decision, but protested against it ; and by consenting to receive the amount paid her, she did not mean to waive any right she might have to the residue.

Some time afterwards, Mr. Dickerson retired from the office of secretary of the navy, and was succeeded by Mr. Paulding, the defendant in this writ of error ; and in the fall of 1838, Mrs. Decatur applied to him to revise the decision of his predecessor, and to allow her the pension provided by the resolution. The secretary declined doing so ; whereupon, Mrs. Decatur applied to the circuit court for Washington county, in the district of Columbia, for a *mandamus* to compel him to pay the amount she supposed to be due to her. A rule to show cause was granted by the court ; and upon a return made by him, stating, among other things, the facts above mentioned, the court refused the application for a peremptory *mandamus*. It is this decision we are now called on to revise.

In the case of *Kendall v. United States*, 12 Pet. 524, it was decided in this court, that the circuit court for Washington county, in the district of Columbia, has the power to issue a *mandamus* to an officer of the federal government, commanding him to do a ministerial act. The first question, therefore, to be considered *in this case is, whether the duty imposed upon the secretary of the navy, by the resolution in favor of Mrs. Decatur, was a mere ministerial act. The duty required by the resolution was to be performed by him, as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of congress, or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress, under which he is, from time to time, required to act. If he doubts, he has a right to call on the attorney-general to assist him with his counsel ; and it would be difficult to imagine, why a legal adviser was provided by law for the heads of departments, as well as for the president, unless their duties were regarded as executive, in which judgment and discretion was to be exercised.

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If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by *mandamus*, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties.

The case before us illustrates these principles, and shows the difference between executive duties and ministerial acts. The claim of Mrs. Decatur having been acted upon by his predecessor in office, the secretary was obliged to determine whether it was proper to revise that decision. If he had determined to revise it, he must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind, whether she was entitled under one only, or under both. And if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment, in deciding whether the half-pay allowed her was to be calculated by the pay proper, or the pay and emoluments of an officer of the commodore's rank. And after all this was done, he must have inquired into the condition of the navy pension fund, and the claims upon it, in order to ascertain whether there was money enough to pay all the demands upon it; and if not money enough, how it was to be apportioned among the parties entitled. A resolution of congress, requiring *516] the exercise of so much judgment and investigation, can, with no propriety, be said to command a mere ministerial act to be done by the secretary.

The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them. Upon the very subject before us, the interposition of the courts might throw the pension fund, and the whole subject of pensions, into the greatest confusion and disorder. It is understood, from the secretary's return to the *mandamus*, that in allowing the half-pay, it has always been calculated by the pay proper; and that the rations or emoluments to which the officer was entitled, have never been brought into the calculation. Suppose, the court had deemed the act required by the resolution in question a fit subject for a *mandamus*, and, in expounding it, had determined, that the rations and emoluments of the officer were to be considered in calculating the half-pay? We can readily imagine the confusion and disorder into which such a decision would throw the whole subject of pensions and half-pay; which now forms so large a portion of the annual expenditure of the government, and is distributed among such a multitude of individuals.

The doctrines which this court now hold in relation to the executive departments of the government, are the same that were distinctly announced

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in the case of *Kendall v. United States*, 12 Pet. 524. In p. 610 of that opinion, the court say, "We do not think the proceeding in this case interferes, in any respect whatever, with the rights or duties of the executive, or that it involves any conflict of powers between the executive and judicial departments of the government. The *mandamus* does not seek to direct or control the postmaster-general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control." And in p. 614, the court still more strongly state the mere ministerial character of the act required to be done in that case, and distinguish it from official acts of the head of a department, where judgment and discretion are to be exercised. The court there say, "he was simply required to give the credit; this was not an official act, in any other sense than being a transaction in the department where the books and accounts were kept: and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act; there is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct or positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act."

We have referred to these passages in the opinion given by the court in the case of *Kendall v. United States*, in order to show more clearly the distinction taken between a mere ministerial act, required to be done by the head of an executive department, and a *duty imposed upon him in his official character as the head of such department, in which judgment and discretion are to be exercised. There was in that case a difference of opinion in the court, in relation to the power of the circuit court to issue the *mandamus*. But there was no difference of opinion respecting the act to be done. The court were unanimously of opinion, that in its character the act was merely ministerial. In the case before us, it is clearly otherwise; the resolution in favor of Mrs. Decatur imposed a duty on the secretary of the navy, which required the exercise of judgment and discretion; and in such a case, the circuit court had no right, by *mandamus*, to control his judgment, and guide him in the exercise of a discretion which the law had confided to him. [*517]

We are, therefore, of opinion, that the circuit court were not authorized by law to issue the *mandamus*, and committed no error in refusing it. And as we have no jurisdiction over the acts of the secretary in this respect, we forbear to express any opinion upon the construction of the resolution in question. The judgment of the circuit court, refusing to award a peremptory *mandamus*, must be affirmed.

McLEAN, Justice.—The answer of the secretary of the navy to the rule to show cause why a *mandamus* should not issue, is conclusive; and I entirely concur with the decision of the circuit court, in refusing the writ. The relatrix having received a pension under the general law, is not entitled to receive one, on the same ground, under the special law. My impression is, that congress having acted upon her case and made a special provision, she cannot claim under the general law. An individual applies to congress for compensation for services rendered to the public, and a special provision is made for his relief. And if a law should be passed at the same

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session, making general provision for the payment of similar services, I should think that it could not be successfully contended, that such individual could claim under the general law. The merits of his claim having been considered and decided by congress, he can only claim under the special provision made for him. But in the present case, the claimant having received, under the general law, as large, if not a larger benefaction, than was given under the special law, her right under the latter is extinguished.

I differ from a majority of the judges, who hold, that the construction of this resolution, giving to the relatrix a pension, is a duty, in the discharge of which, an executive discretion may be exercised. The law is directory and imperative, and admits of the exercise of no discretion, on the part of the secretary. The amount of the half-pay pension given in the resolution, is fixed by law ; and is, therefore, certain. I am authorized to say, that my brother STORY agrees with this view of the case.

*518] *BALDWIN, Justice.—I concur with the court in not interfering with the proceeding of the circuit court, refusing the *mandamus* prayed for by the relator, on the ground that she is not entitled to the benefits of the general pension law of the 3d March 1837, and of the special resolution passed on the same day in her favor. My opinion is not founded on any special proceedings in the passage of the law and resolution, which have been referred to from the journals of the two houses, but from the intention of congress, apparent in the provisions of the two acts, not to give cumulative pensions, and the general principle of law, that where provision is expressly made by law for a particular case, it does not come within the general provisions of another law, which may embrace it by its general terms. 4 Story 2542, 2556. Had it been the intention to give both, the presumption is, it would have been so declared ; and the nature of the pensions, one being for life, and the other for five years and arrearages, shows the intention to be contrary, and to give her the election which she should claim ; she has yet that election, as it appears from the return to the rule, and the affidavits in the case, that the receipt of the pension under the general law, was, under such circumstances, no waiver of the pension specially given to her, should she now elect to take it, in preference to the general provision under the contemporary law.

But I cannot concur in opinion with the court, on the grounds on which they affirm the judgment, for two reasons : 1. That the circuit court had jurisdiction of the case ; and 2. That this court had not jurisdiction : and in order to ascertain whether the circuit court had jurisdiction, it is necessary to ascertain what is jurisdiction, as contradistinguished from its exercise ; for we all agree, that if the jurisdiction exists, there was no error in refusing the *mandamus* prayed for. "The power to hear and determine a cause is jurisdiction ; it is '*coram judice*,' whenever a case is presented which brings this power into action ; if the petitioner states such a case in his petition that, on a demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction ; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing of a petition, containing all the requisites, and in the manner prescribed by law."

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6 Pet. 709. The objection to jurisdiction "must be considered and decided, before any court can move one farther step in the cause; as any movement is necessarily the exercise of jurisdiction. It is the power to hear and determine the subject-matter in controversy between parties to the suit, to adjudicate, or to exercise any judicial power over them; the question is, whether on a case before a court, their action is judicial or extra-judicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and what is the right of the case, is judicial action by hearing and determining it." 12 Pet. 718. If the court can act on any one subject of the petition, any matter "on which the plaintiff asks its interposition, it must be retained; so that the true inquiry is, not as to the extent, but the existence of any jurisdiction" (Ibid. 732); if any case is made out for its exercise (13 Pet. 162); if any relief can be given, we must proceed. 8 Pet. 536; 10 Ibid. 228. "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is binding in every other court. But if it act without authority, its judgments and orders are nullities; they constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers." 1 Pet. 340; s. p. 2 Ibid. 163-9; 3 Ibid. 203. When a court of general civil jurisdiction gives judgment for a debt, or confirms an act directed to be done, neither the existence of the debt, nor validity of the act done, can be afterwards questioned, unless on appeal or writ of error; their power to act upon the subject, to judge whether the debt is due or not, is a question always open, collaterally; but if they can act upon it judicially their errors, however apparent, their proceedings, *inverso ordine*, or contrary to law, have no effect on their jurisdiction, or the validity of its exercise, till an appellate power shall reverse them. 10 Pet. 472-6; s. p. 2 Ibid. 167, 169. If the judicial function has been exercised by lawful authority, the court has jurisdiction; otherwise their acts are *coram non iudice*. Ibid. 474. The judgment of a competent court, "withdrawn by law from the revision of this," is a sufficient cause to detain a prisoner; we cannot "look beyond the judgment, and re-examine the charges on which it was rendered." The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court, as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it." 3 Pet. 202-3; s. p. 7 Wheat. 42-45. The circuit court for the district of Columbia is a court of record, having general jurisdiction over criminal cases. An offence cognisable in any court, is cognisable in that. If the offence be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of the question is the exercise of jurisdiction, whether the judgment be for or against the prisoner, the judgment is equally binding in the one case, as in the other; and must remain in full force, unless reversed regularly by a superior court, capable of reversing it. If this judgment be

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obligatory, no court can look behind it. If it be a nullity, the officer who obeys it is guilty of false imprisonment." Ibid. 203-9, *passim*.

These principles draw the line between jurisdiction, and its exercise, so clearly, as to supersede the necessity of my further inquiry what they are respectively ; leaving no open question, except their application to this case, which is an application, or motion for a *mandamus* to the secretary of the navy, to compel him to pay to the relator, or to issue his warrant for the pensions claimed by her, under the act and resolution of congress of the 3d March 1837. The first proceeding in the circuit court was on a petition and affidavit in the proper form, praying for a rule to show cause why a *mandamus* should not issue; to which a return having been made; it was adjudged to be sufficient, and the motion for the *mandamus* was refused to be granted. Did, then, the petition, affidavit, &c., present a case for the exercise of the judicial power of the circuit court, or was it a matter *coram non judice*, is the question ? for if they could inquire into it, as judges, they had power to grant the rule, however erroneously, illegally or even oppressively, they might act in doing it. In that stage of the cause, the proceeding was on the case as made out by the relator, which might justify the rule ; though on the return of the respondent, there might be conclusive reasons for proceeding no further ; but as the question of jurisdiction is on the first step, all questions which follow it are matters of discretion in its exercise, so that the only inquiry is, whether the case is "of judicial cognisance." 12 Pet. 623.

In ascertaining the jurisdiction of the circuit court of this district, I shall confine myself to the opinion of this court in *Kendall v. United States*, in which it was decided, that the case was proper for a *mandamus*, and that that court had power to issue it. After a review of former decisions, they proceed : "The result of these cases clearly is, that the authority to issue the writ of *mandamus* to an officer of the United States, commanding him to perform a specific act required by a law of the United States, is within the scope of the judicial powers of the United States, under the constitution." 12 Pet. 618. "Congress has the entire control of the district, for every purpose of government ; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice. The circuit court here, is the highest court of original jurisdiction ; and if the power to issue a *mandamus* in a case like the present exists in any court, it is vested in that court." Ibid. 619. "There can be no doubt, but that in the state of Maryland a writ of *mandamus* might be issued to an executive officer, commanding him to perform a ministerial act required of him by law ; and if it would lie in that state, there can be no good reason why it should not lie in this district, in analogous cases." Ibid. 621. The court then decided, that the circuit court of the district has the power to issue a *mandamus*, under the first, third and fifth sections of the 27th February 1801 (Ibid. 622), and in applying the law to the case before them, say, "there was no want of jurisdiction, then, as to the person ; and as to the subject-matter of jurisdiction, it extends, according to the language of the act of congress, to all cases in law or equity. This, of course, means cases of judicial cognisance. That proceedings on an application to a court of justice for a *mandamus*, are judicial proceedings, cannot admit of a doubt ; and that this is a case in law

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is equally clear." Ibid. 623-4. The court then construe the third section of the act of the 27th February 1801 (2 U. S. St. 105), "as if the 11th section of the act of 13th February 1801 has been incorporated into it," by which this section declares, "that the circuit courts shall have cognisance of all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority; which are the very words of the constitution, and which is, of course, a delegation of the whole judicial power, in cases arising under the constitution, laws, &c.; which meets and supplies the precise want of delegation of power, which prevented the exercise of jurisdiction, in the case of *McIntire v. Wood*, and *McClung v. Silliman*; and must, on the principles which governed the decision of the court in those cases, be sufficient to vest the power in the circuit court of this district." 12 Pet. 626. Its judgment, awarding a peremptory *mandamus* against the postmaster-general, was accordingly affirmed. See 6 Wheat. 600.

As the authority of that case has been recognised in the opinion of the court delivered in this, it must be considered as settled, that the circuit court of this district, having the cognisance of all cases in law or equity, and being a court of general jurisdiction, is invested with the whole judicial power of the constitution, in relation to writs of *mandamus*; which is jurisdiction, if judicial cognisance of the person, the subject-matter, and the power to hear and determine, is jurisdiction; and of consequence, that court has a right to decide every question which arises in the cause, when their first step is judicial, under the authority of law. 1 Pet. 340. It is admitted, that if the law had required the secretary of the navy to do a ministerial act, the jurisdiction of that court would be unquestionable; not only to grant the rule to show cause, to issue the *mandamus*, but enforce it by ultimate process, if no sufficient cause is shown to the contrary in the return: which appears to me to be also an admission, that that court may and must judicially inquire whether the act enjoined by law and refused to be performed, is ministerial, executive or discretionary, in its nature. It is of the essence of the jurisdiction of any and every court of record, which is authorized to decide on any class of cases; to inquire whether, in the one before them, it is of that class; whether it is proper for the exercise of their power; and how it shall be exercised; otherwise, its action is abortive, and its proceeding by the most solemn consideration is a nullity, if their jurisdiction is to be tested by the judgment which they shall render.

If a decision in this case, that a *mandamus* shall not issue, is not a nullity, a contrary one cannot be; for such a decision is the result of a judicial inquiry, which the law authorizes to be made, whether the rule shall be granted, and the proceedings be followed up to consummation, or not: the law authorizes this inquiry into the facts of the case, and the judgment of the court puts an end to the "inquiry concerning the fact, by deciding it." To determine whether the facts of the case are legally sufficient to award the process of the court, "is among the most unquestionable of its powers and duties." 3 Pet. 203. The decision of these questions is the exercise of jurisdiction, whatever judgment may be given; and if the principles laid down in the case of *Kendall*, are law in this, the result is irresistible, that the court which can decide the facts and law, on which the granting or refusing a *mandamus* depends, has jurisdiction to hear, determine and render a

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judgment on the application ; which is conclusive till reversed. When this court has most solemnly adjudged, that the authority to issue a *mandamus* "is within the scope of the judicial power of the United States, under the constitution ;" that if it exists in any court, it is vested in the circuit court of this district ; and that the power in that court to exercise this jurisdiction, "results irresistibly" from the act of 1801 ; I am wholly unable to reconcile the conclusion formed in this case, with the principles and premises established in that ; or to view the two cases in connection, on this point, without the conviction, that they are entirely repugnant, as well in principle as in their consequences.

It is the settled law of this court, that it cannot issue a *mandamus* to a public officer, in virtue of its original jurisdiction (1 Cranch 174, &c. ; 12 Pet. 621) ; that this circuit court, by its original, general jurisdiction, has been invested with this power ; that it exists in no other court ; is within the scope of the judicial power of the United States ; and consequently, exclusively within the judicial cognisance of that court. An award of a peremptory *mandamus* to the head of one executive department, has been affirmed as an act within the jurisdiction of the court, and is a case proper for its exercise ; because the thing commanded to be done was ministerial in its nature. 12 Pet. 618, 626. A decision of the same court, refusing a *mandamus* to another head of an executive department, has also been affirmed, on the ground, that that court had no jurisdiction of the case, because the act which that officer was called on to perform, was of an executive, discretionary nature, and consequently, not ministerial ; from which no other conclusions can result, than these :

1st. That the court, which has exclusive, original jurisdiction, to award a *mandamus* to a head of department, in any case, the only court in whom this power is invested, has neither jurisdiction, nor power to inquire judicially, whether the act which is the subject of the application for a *mandamus*, is of that nature as to justify the awarding of this writ, and of consequence, cannot decide whether it shall issue or not, for if it can so inquire and decide, that is necessarily the exercise of jurisdiction.

2d. That the only court, which has any original jurisdiction over the person and subject-matter, to which the application for the *mandamus* applies, is incompetent to hear and determine it on its merits ; if this court, in its exercise of appellate power on a writ of error, shall be of opinion, that the circuit court ought not to award the *mandamus* in the case before them, on the sole ground that the act complained of was not ministerial, and that, therefore, the subject-matter was *coram non judice*, in that court.

3d. Whence it follows, that this court, in virtue of its appellate jurisdiction, can alone exercise the judicial power of the United States, to hear and determine a case on a *mandamus*, which turns on the question, whether the act sought to be commanded to be done, was of a ministerial nature, a proper subject for the writ, or of an executive or discretionary character, which made it improper to issue it. In other words, that the award of a *mandamus*, in a case where its award would be erroneous, was an usurpation of the judicial function, a nullity, had it been made in this case ; which conclusions can, in my opinion, be drawn only by overlooking the settled distinction between jurisdiction, and its erroneous exercise.

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Though it matters not, for the purposes of this case, on what ground the judgment below is affirmed, a view of the consequences which must result from a denial of jurisdiction, under the opinion of this court, must lead to the most serious considerations ; for the want of original jurisdiction leaves a judgment rendered in a case *coram non judice*, as utterly null and void, when objected to in a collateral action, as it is after a reversal on error. Nay, more so, where the nullity arises from an intrinsic want of power, it requires not the action of an appellate court, to authorize all the world to disregard it, to oppose, even by force, the officer who attempts to execute any order or judgment, which the court may make or render, and makes him liable to an action or indictment, if he actually executes it. Now, let it be supposed, that in enforcing a proceeding by *mandamus*, the marshal or the defendant is maimed ; an indictment is found ; it must be tried in the circuit court of this district ; they decide that they had jurisdiction in the *mandamus*, and power to issue the attachment ; that the marshal had lawful authority to execute it by force, if resisted, convict, sentence, and imprison the defendant ; the hands of this court are paralysed by its own decisions. The sentence of the circuit court is final, absolute and conclusive of the facts, as well as the law ; it is withdrawn from any revision by this court, by *habeas corpus* (7 Wheat. 42 ; 2 Pet. 202, 209), by writ of error (3 Cranch 170-2, 174), or *mandamus* (3 Dall. 42 ; 13 Pet. 290, 408) ; the judgment “ is as conclusive on all the world, as the judgment of this court would be, as conclusive on this court at on other courts ” (2 Pet. 203), though this court should be of opinion, that in law the marshal ought to have been convicted. Ibid. 209. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity ; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous.” Ibid. Let this principle be applied to a *mandamus*, according to the opinion in *Kendall's Case*, it will be manifest, that the circuit court, having original, exclusive and general jurisdiction in this case, had, if that case remains authoritative, full authority to exercise it, by any order, judgment or process, which they deemed to be called for, in the exercise of their discretion, on the exigencies of the cause. It does not come within any power of this court, by looking to consequences, to remove any restrictions on its appellate jurisdiction, or to exercise it, where it is not clearly given ; it may decide on the errors of inferior courts, in assuming, or exercising, their powers ; but if it is admitted, that they have jurisdiction over the person and subject-matter, and power to issue the process in question, the power of this court is restricted to a revision of the exercise of those powers. “ Whether such a restriction be not inconsistent with sound public policy, and does not materially impair the rights of other parties, as well as of the United States, is an inquiry deserving of the most serious attention of the legislature. We have nothing to do, but to expound the law as we find it ; the defects of the system must be remedied by another department of the government.” 3 Wheat. 309. “ We are entirely satisfied to administer the law as we find it.” “ The argument of inconvenience has been pressed upon us with great earnestness. But where the law is clear, this argument is of no avail ; and it will probably be found, that there are also serious inconveniences on the other side. Wherever power is lodged, it may be abused ; but this forms no solid objection to its exercise. Con-

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fidence must be reposed somewhere ; and if it should be abused, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice." 7 Wheat. 45. "The question whether an offence was or was not committed, that is, whether the indictment did or did not show that an offence had been committed, was a question which that court was competent to decide." 3 Pet. 206. So, on a motion for a *mandamus*, the question is, whether on the petition and affidavits on the part of the relator, a rule should be granted to show cause, or the writ be awarded, or refused." "The cases are numerous, which decide that the judgments of courts of record having general jurisdiction of the subject, although erroneous, are binding, until reversed." "This acknowledged principle seems to us to settle the question now before the court. The judgment of the circuit court in a criminal case, is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power, by the instrumentality of the writ of *habeas corpus*. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied." Ibid. 207. "Without looking into the indictment, &c., we are unanimously of opinion, that the judgment of a court of general criminal jurisdiction justifies this imprisonment," &c. (though as this court had declared, "that court has misconstrued the law, and has pronounced an offence to be punishable criminally, which, as we may think, is not so"); and "that the writ of *habeas corpus* ought not be awarded." Ibid. 209.

These acknowledged principles must apply to the judgment or order of the former court on a *mandamus*, as it has the same original, general and exclusive jurisdiction in those cases, as it has on criminal offences ; the judgment is, of course, equally evidence of its own legality, and conclusive till reversed ; the only difference between the two classes of cases, is dependent on the question, whether this court has power to revise a judgment on a *mandamus*, either by a writ of *habeas corpus*, or a writ of error. On the application for a *habeas corpus*, this court must see that there is a judgment of a court, having knowledge power to act in the case ; all inquiry thus ceases, as this court cannot look beyond the judgment ; if they inspect the petition, &c., to ascertain whether the case presented is one proper for the exercise of original jurisdiction, they usurp it, by placing themselves in the seat of the circuit court, in exercising the precise function which has been delegated to that court, in the plenitude of judicial power. On the same ground, this court might revise the judgment of a circuit court held in a state, on an action, or indictment, by *habeas corpus*, and discharge the defendant from imprisonment ; not because the court below had not power to hear, determine or render a judgment ; but because on the case, as it appeared by looking beyond the judgment, it ought to have been for the defendant. Such power has never been asserted or exercised in relation to any circuit court ; it has been solemnly denied as to the court of this district, which has "larger powers, in cases of *mandamus*, than any other court." 12 Pet. 615, 626. If a writ of *habeas corpus* does not lie on its judgments in criminal, and other civil cases, it cannot lie on a judgment in a case of *mandamus* ; if the party cannot be discharged on *habeas corpus*, it is decisive of jurisdiction, and

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shows most clearly, that the only questions which can be revised relate to errors alleged on matters of law, apparent in the record and judgment. That this is a case within the jurisdiction of the circuit court, I, therefore, cannot doubt, even admitting that had it been exercised, in any way interfering with the defendant, under the circumstances of this case, it would have been contrary to law, on the construction of the act and resolution of congress; but that the action of that court can be declared to be extra-judicial, on a matter within their acknowledged jurisdiction, merely because it related to an act which this court deem not to be ministerial, seems to me to be the subversion of principles which have been long established, and till now have been held as acknowledged ones in every past adjudication.

In my opinion, there can be no subject on which this court should act with more caution, or adhere more steadily to the marked corner-trees of the law, than those which point to, and denote the line between the jurisdiction of inferior courts and its exercise; indeed, there is no subject on which a departure from an established principle would more radically "subvert our whole system of jurisprudence." 9 Pet. 602. When it is considered, that on the adherence to this line, or a departure from it, every order, decree or judgment of the courts of the United States, on the various subjects of their jurisdiction, is absolutely conclusive on the subject-matter decided, if no appeal or writ of error lies or is taken; or an absolute nullity, binding neither on other courts, parties, nor the officers of those courts which render a judgment, who may refuse to execute, or become punishable in executing it; the inquiry into jurisdiction becomes a question of the highest import. If the past adjudications of this court had settled the law to be, that on the question whether a circuit court had jurisdiction of an action of ejectment or debt, this court could look through the judgment, to the declaration and evidence, when the parties and subject-matter were confessedly within their jurisdiction; and make the mode in which it had been exercised by a judgment, for plaintiff or defendant, the test of the power to render any judgment at all; or if it had the right, on an indictment and sentence, to make the same inquiry, when the power of the court to try and punish was admitted; I should feel bound to apply the same principles to a case of *mandamus*, in the circuit court of this district, without feeling myself at liberty to look to the consequences. But finding the law to be settled otherwise, in all other cases, and being wholly unable to discover in the decisions of this court, any one rule or principle, which will except the case of a *mandamus* from the application of the cases cited; I feel bound to examine the effect of testing the jurisdiction of a court on *mandamus*, by a rule, which is repudiated in every other case, civil or criminal. The difference between an adherence to, or an innovation upon, established principles of general application, on any supposed inconvenience, seems to me to be as visible, as practical, and as important, as the difference between a change of system of jurisprudence by legislative power, and the assumption of a power by a court, to make it what it ought to have been made by a law. Being fully convinced, that on the authority of this court, the proposition, that if the circuit court can deliberate, by judicial power, on granting a rule to show cause why a *mandamus* should not issue; all intermediate questions between the rule, and an attachment, are and can be nothing else

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but the exercise of jurisdiction, is fully supported, I have nothing to add on this point.

It is also my opinion, that the acts to be performed by the secretary of the navy, in relation to the payment of a pension, either under the general laws, or the special resolution in favor of the relator, if, by their fair construction, she was entitled to the extent of her claim, are of a purely ministerial nature, according to the decisions of this court. If the right of the relator was in all other respects clear, except so far as they depended on the construction of the acts of congress, the case was of judicial cognisance only ; the duty of a secretary is not judicial ; it is not his province to construe laws, which enjoin on him the performance of definite acts, differently from what the courts have done, or may do. Where the law directs him to act, he must act according to law, on all matters where his duty is prescribed, so as to restrain his discretion ; as the commissioner of the navy pension fund, he decides whether the applicant comes within the law, on the evidence adduced before him ; but when he has decided that a pension is due, or when the law declares that a person named is entitled to one, and prescribes the amount, he has no longer a discretion to withhold it. The ascertainment of the date at which the pension commenced, its amount and duration, are ministerial acts on which discretion is excluded, for its exercise cannot alter either ; if the payment is a right of the applicant, the law makes it a duty to pay, or give a warrant for payment by the officer who holds the fund. Thus, under the general act, it is enacted, "that if any officer," &c., "have died," &c., "leaving a widow," such widow shall be entitled to receive," &c. (5 U. S. Stat. 180), or resolved, "that the widow of the late S. D. be paid from the navy pension fund a pension," &c. (Ibid. 199), the command of the law is unqualified in both cases ; if the applicant comes within the description, the officer whose duty it is to pay, or direct the payment, has no discretion to do it or not, after being satisfied of the right of the applicant, as one of the beneficiaries of the law. The name must be inscribed on the pension roll, and thenceforth, the payment is but the execution of a specific defined duty, prescribed by law, of the same nature as entering an ascertained credit, on the account of a contractor in the post-office department (12 Pet. 614), the issuing a patent, after all the requisites of the law have been complied with (6 Wheat. 600), or the payment of a liquidated claim, under a special act of congress directing it to be done. In all these cases, the act to be done is purely ministerial ; all the discretion to be exercised has been exhausted ; the duty is positive, by the command of the law, which no authority can supersede or grant a dispensation from its performance ; nor while *Kendall's Case* is recognised as authority, can the nature of an executive office exempt the incumbent from the supervisory power a competent court, in a case otherwise proper for its exercise. 12 Pet. 610-15.

The judges of the courts of the United States are not clothed with any immunity or exemption from this power ; it is applied to them ; and courts of record, of general jurisdiction, to the extent of the judicial power of the United States, by this court, and on the same principles, as to an executive officer, by the court of this district, not where the law confides a discretion to do or withhold a particular act, but where it requires it to be done, as a ministerial duty. As, where the law required, that after the court

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had rendered a judgment, it should be signed by the judge, and the judge died after the rendition of the judgment, but without affixing his signature to the record; his successor refused to sign it, because the judgment had been given by his predecessor, and this court held: That the judge in office had a discretion to set aside the judgment by granting a new trial; but if he did not exercise his discretion by doing it as a judicial act, he was bound to sign the judgment as a mere ministerial act required by law; in order to give one party a right to execution, and the other a right of appeal or writ of error. In the opinion of this court, there is the following sentence, which is too appropriate to one ground of objection to the jurisdiction, and action of the circuit court, in this case, to be omitted; it is this: "But the district judge is mistaken in supposing that no one but the judge who renders the judgment can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act in every case that remains undecided on the docket, as fully as his predecessor could have done. The court remains the same, and the change of the incumbent cannot, and ought not, in any respect, to injure the rights of the litigant parties." A peremptory *mandamus* was awarded. 8 Pet. 303-4. In this case, the change of officers who had the disbursement of the pension fund, can have no effect on the rights of the relator; a refusal by the predecessor of the present incumbent, is no legal cause for his refusal to do the act required, had it been enjoined by law; it can be considered only as a repeated refusal of successive applications, having the same effect as if made to himself to perform the same ministerial act, which it would have been the duty of either to perform, if the right claimed had existed, but as it did not exist, the refusal was justifiable.

The remaining point in this case is, whether a writ of error lies from this, to the circuit court of this district to remove and revise the proceeding on *mandamus*; which I shall not examine in detail, as my opinion in *Holmes v. Jennison*, on the same question in the kindred case of *habeas corpus*, is given at length. If this question remained as unembarrassed by the authority of this court, as it was in the case of *Holmes*, I should have as little doubt in this, as I had in that case; but as this court asserted their power to issue the writ of error in the case in 7 Wheat. 534, and acted on it in 12 Pet. 608-26; the question can no longer be considered exclusively on the principles of the common law, the terms of the judiciary act, or analogous decisions of this court. Yes as the case in 7 Wheaton did not call for any action of this court, as the argument is not set out, nor any authority quoted in favor of the writ of error, and the court confined themselves to a mere declaration that it would lie, and in the case in 12 Peters, this question was argued only on one side, and entirely unnoticed by the court in their opinion, it cannot be considered as conclusively settled.

That the great questions of jurisdiction, which arise in this court, in cases on error under the 22d or 25th sections of the judiciary act, should be considered with the greatest deliberation, and remain open till all doubts are removed, especially, in cases where the common law is decisive against the jurisdiction, no one will deny. When the court express an opinion, or act in a case involving their jurisdiction, in which there is either no argument, a partial one, or *ex parte* only; it ought not, and cannot have the

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same weight as judicial authority, as when the whole subject is presented to the court ; considered as it may be elsewhere than in open court, it is necessarily in the absence of counsel, and of any but a very limited reference to adjudged cases. In other times, this court often declared, that a point decided without argument remained open for consideration (3 Cranch 172 ; 6 Ibid. 317), till it was directly made ; even on a question of jurisdiction, which was for the first time made, thirty-four years after the court had been in the constant exercise of that which was objected to. In *Buel v. Van Ness*, it was objected, that the amount of a judgment in a state court, was not sufficient to ground an appeal or writ of error, this court say : "This is a new question ; thirty-four years has this court been adjudicating under the 25th section, &c. ; and familiarly known to have passed in judgment upon cases of very small amount, without ever having its attention drawn to the construction, &c., now contended for. Nevertheless, if the received construction has been erroneously adopted, without examination, it is not too late to correct it now. But we think that is not necessary to sustain our practice upon contemporaneous, and long-protracted expositions, that as well the words of the two sections under which we exercise appellate jurisdiction, as the reasons and policy on which those clauses were enacted, will sustain the received distinction between the cases to which those sections extend." 8 Wheat. 321-2. As no past opinion of this court has taken this course, in considering this question, I hold it to be as open now, as it was in the case just quoted ; and shall pursue that which the court then took.

A *mandamus* is directed to a judge, to an inferior court, or an officer, commanding the performance of a specific act ; but it lies in neither case, on any matter of discretion, or to coerce the judgment as to the manner of acting, where the law permits the doing or refusing to do the act ; though it does lie to enforce the performance of a mere ministerial act, by an executive officer (12 Pet. 610), a judge or court (8 Pet. 302), which they have no "authority to deny or control." Ibid. The *mandamus* acts upon no right of the respondent, of person or property, where he has no interest in the subject-matter, as in the case now before us. "The real parties to the dispute are the relator and the United States," who cannot be sued, or the claim be in any way enforced against them, without their consent through an act of congress ; but when they consent to submit the whole subject of pensions, to an officer of their own, and impose on him a positive duty to pay, he is the mere instrument to execute the law. See 12 Pet. 611-12.

The command of the writ of *mandamus*, is no "final judgment" in a cause before a court, "on which a writ of error may issue for its reversal" (8 Pet. 303) ; it is one of "those intermediate proceedings, which take place between the institution and trial of a suit ; obedience may be refused, if it be shown that there are matters in the cause, which are within the discretion of the court below, which justify the refusal (8 Pet. 589-90) ; and what is conclusive on this point, is, that a writ of error may be dismissed by this court, for the want of jurisdiction, as was done in 12 Pet. 140, in the same case, in which a peremptory *mandamus* had been awarded four years before (8 Pet. 304), to sign a judgment previously rendered ; and in which this court refused a second *mandamus*, to render a final judgment. 9 Pet. 602, 605. All that this court can do, is to order the court below to proceed to judgment ; but it will not direct in what manner its discretion

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shall be exercised (8 Pet. 304 ; 9 Ibid. 602-3) ; it compels them to "proceed to a final judgment, in order that we may exercise the jurisdiction of review given by the law" (12 Pet 622), but only for that purpose. Ibid.

A *mandamus* never issues to an executive officer to control his discretion or judgment, where the law gives him any right to deliberate, it is to perform ministerial acts which the law has enjoined on him ; the *mandamus* is a summary order to enforce the duty, by supplying a remedy for a denial of an existing right, where, for the want of a specific one, there would otherwise be a failure of justice. 12 Pet. 620. The writ of *mandamus*, like the writ of *habeas corpus*, is a writ of right ; but the proceeding upon it is matter of discretion, in no wise partaking of the character of a final judgment, its effect, or an award in the nature of a final judgment, which can be revised on error ; so the law has been finally settled in England by the house of lords, as declared and recognised by this court in 6 Pet. 657 ; and so it must be considered here, unless a final judgment means one thing in the judiciary act, and another and different thing at common law, which distinction is negated in the same case. The writ of *mandamus*, as known to the common law, is well defined in 1 Cranch 171 ; 5 Pet. 192, and 12 Ibid. 620 ; it is a prerogative writ, which is issued from the court of king's bench, in virtue of its general supervising power over all inferior tribunals and officers, to compel them to what that court has determined, or supposes, to be consonant to right and justice, where there is no other specific remedy prescribed. Yet this court have held, that the mandatory writ in the register, which issues from the *officina brevium*, under the seal of the court of chancery, performs the same office, without the interference of the court of king's bench. 5 Pet. 192-4. If this be so, then there is a specific remedy by an appropriate writ in the register, grantable on motion in chancery ; there is a concurrent jurisdiction in the two courts ; and of consequence, it would seem not to be a prerogative writ, even by the common law, when directed to an inferior court ; but a writ in the nature of a *mandamus* described in 12 Pet. 622. In 5 Pet. 193, a *mandamus* to a public officer, is declared to be the exercise of original jurisdiction, but appellate when directed to a court ; the power of this court to issue this writ is asserted, under the 13th section of the judiciary act, to be the same which is exercised by the chancellor, in England, and by the supreme courts of the states, in virtue of their "general superintendence of inferior tribunals," and the court use this language : "The judiciary act confers this power expressly on this court ; no other tribunal exists by which it can be exercised." Ibid. 194. In 12 Pet. 621, "the power to issue this writ, and the purposes for which it may be issued in the courts of the United States, other than this district, is asserted under the 14th section, as a power common to this and the circuit courts in the states. But this power is not exercised, as in England, by the king's bench, as having general supervising power over inferior courts, but only for the purpose of bringing the case to a final judgment or decree, so that it may be reviewed. Ibid. 622. So far, then, as respects a *mandamus* from this to a circuit court, or from a circuit to a district court, it is clear, that no decision upon such writ is a final judgment revisable in error or on appeal, as well on these principles, as the following language of this court in 9 Pet. 602, in an unanimous opinion delivered by the late chief justice, on a motion for a *mandamus* :

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"This court is asked to decide, that the merits of the case are with the plaintiffs; and to command the district court to render judgment in their favor. It is an attempt to introduce the supervising power of this court into a cause, while depending in an inferior court, and prematurely to decide it. In addition to this obvious unfitness of such a proceeding, its direct repugnance to the spirit and letter of our whole judicial system cannot escape notice. The supreme court, in the exercise of its ordinary appellate jurisdiction, can take cognisance of no case, until a final judgment or decree shall have been rendered in the inferior court. Though the merits of the cause may have been substantially decided, while anything, though merely formal, remains to be done, this court cannot pass upon the subject. If, from any intermediate stage in the proceeding, an appeal might be taken to the supreme court, the appeal might be repeated, to the great oppression of the parties. So, if this court might interpose in the progress of a cause, by way of *mandamus*, and order a judgment or decree; a writ of error may be brought to the judgment, or an appeal from the decree, and a judgment or decree entered in pursuance of a *mandamus*, might be afterwards reversed. Such a procedure would subvert our whole system of jurisprudence."

Taking it, then, as settled, that on a proceeding by a *mandamus* to an inferior court, no writ of error lies, I now proceed to inquire, whether it will lie, when the *mandamus* is directed to an officer to perform a merely ministerial act, by a court having original jurisdiction to award the writ, as the court of this district, is admitted to possess by the acts of February 1801, referred to in 12 Pet. 619, 622, 624. As the purposes of this case do not require it, I shall not examine into the apparent discrepancy between the opinion in 5 Peters, and 12 Ibid., on the nature or office of the writ of *mandamus*, whether they depend on the 13th or 14th section of the judiciary act; but confine myself to the view which the court take of the subject, under the act which gives jurisdiction to the court of this district to award it, which is this: "That proceedings and an application to a court of justice for a *mandamus*, are judicial proceedings, cannot admit of a doubt; and that this is a case in law, is equally clear. It is the prosecution of a suit, to enforce a right secured by a special act of congress, requiring of the post-master-general the performance of a precise, definite and specific act, plainly enjoined by the law. It cannot be denied, but that congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well-organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist; and if the remedy cannot be applied by the circuit court of this district, it exists nowhere. But by the express terms of this act, the jurisdiction of this circuit extends to all cases in law, &c. No more general language could have been used; an attempt at specification would have weakened the force and extent of the general words, *all cases*. Here, then, is the delegation to this circuit court, of the whole judicial power in this district, and in the very words of the constitution, which declares that the judicial power shall extend to all cases in law and equity arising under the laws of the United States," &c. 12 Pet. 623-4.

No one has ever denied, that congress has power, by the constitution, to give authority to the courts of the United States, to issue a *mandamus*

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to an inferior court, or a public officer ; the only objection to its exercise by this court, on the writ directed to the secretary of state was, that it was by original jurisdiction, which could not be granted in such case. 1 Cranch 175. But this objection cannot avail, when applied to a court of general, original and exclusive jurisdiction, in the whole range of the judicial power of the constitution ; which necessarily embraces prerogative, among all other writs known to the common law, or the laws of the states which ceded this district to the United States, with powers of exclusive legislation in and over it. Such is the jurisdiction of the circuit court of this district, as declared in the above extract from the opinion in *Kendall's Case*, which contains in substance the common law definition of the prerogative writ of *mandamus* ; whether it is directed to a court or an officer, it equally comes within the definition, being adapted to the exigency of the case, so as to give an adequate remedy whenever there is an existing right which can be enforced by no other process, which is the very office of the common-law prerogative writ. There is no principle of law, there is no decision of this court, nor any provision of any act of congress, which discriminates a *mandamus* to a court, from one to an officer, either in its nature, the action of the court upon it, or the effect thereof. It is but an order to do an act, ministerial in its nature, enjoined by law, in a case which involves no discretion, nor leaves any alternative ; such an order is never made, where a judicial act remains to be done by a court, or an executive act to be performed by an officer, which the law submits to the exercise of his own judgment on the matter. Thus, in 8 Pet. 304, the order was made to sign a judgment previously rendered, because the law commanded it ; but in the same case, the court refused to order a judgment to be rendered for the plaintiff. 9 Pet. 602. So, in *Kendall's Case*, the *mandamus* was properly issued, for the reasons assigned, the act commanded was purely ministerial ; it was refused in this case, because some discretion was involved, which will be found to be the turning point in all the cases at common law, or in this court, without a *dictum* in either, which asserts the doctrine, that the order of the court partakes any more of the character or effect of a final judgment, in the one class of cases than the other. Each is the prosecution of a suit to enforce a right, secured by a special, or the general, law which governs the case ; the proceeding is the same in both, from the presentation of the petition till the order of the court is made ; and when made, the order relates to a ministerial act, in which neither the court nor the officer has any interest, unless in cases where the *mandamus* restores the relator to an office, of which he has been ousted by an illegal act. But in such cases, the *mandamus* affects only the possession (See 12 Pet. 620) ; the right to the office remains open on a *quo warranto*.

In the present case, the writ is prayed for in order to obtain the payment of a sum of money, to which the respondent has no claim ; the act required of him is to sign such warrant or other order on the officer who has the custody of the pension fund, as will enable the relator to receive what congress have appropriated to her use. Whether such appropriation has been made, depends on the construction of the acts of congress ; which must be decided by the court, and not the secretary ; if the right to the sum claimed exists by the law, its payment is as much a ministerial act in signing the warrant, as signing a judgment already rendered ; both being an execution

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of the command of the law ; there is no principle which excludes a writ of error in one case, that can justify it in the other. The only question in this case is, whether congress has directed the money to be paid, as it was in *Kendall's Case*, whether the credit should be given ; when that is settled, the *mandamus* only enforces the right of the relator to receive that which congress had declared belonged to her ; the awarding the writ is by a summary order, made on affidavit and motion, without a jury, or the forms of the common law being pursued, as in suits commenced by original writs. Whether the subject-matter of the order relates to the payment of money, or any other act of a ministerial nature, the nature or character of the order does not become that of a final judgment, revisable by a writ of error, the common law does not authorize any appellate proceedings on a prerogative writ ; the judiciary act makes no provision for it ; and nothing but future legislation can, in my opinion, convert a summary order on a motion or rule, into a final judgment, so as to make it cognisable in error. The reasoning of the court, in 9 Pet. 602, is conclusive, that error does not lie to an order awarding a *mandamus* to a court. It is admitted, that it does not lie at common law in any case of *mandamus* (6 Pet. 657) ; for which one reason alone is sufficient to show the true policy of the law. That as this remedy was designed to be a speedy one, the party who had obtained it should not lose its benefit by being hung up by a writ of error (1 Str. 543, 8 Co. 127 b), or, in the language of this court, by the appeal being " repeated to the great oppression of the parties " (9 Pet. 602), by subjecting them to all the delay incident to an appeal, or writ of error ; which " would subvert our whole system of jurisprudence " (Ibid.), if a summary order shall be deemed a final judgment or decree.

The essence of a prerogative writ is in the promptitude of the remedy ; it is devised to create one, where none adequate existed ; and it is administered so as to meet the ends of justice in a summary manner. 12 Pet. 620. It is not for me to say, whether power to so act, ought to be subject to revision ; my inquiry is only, whether the law has made it so, by prescribing one rule for the case of its exercise on a court or judicial officer, and a different one for an executive or ministerial officer. The most solemn decisions of this court justify me in denying the existence of any revising power in the first classes of cases ; every reason and principle on which they are founded apply equally to the last classes ; and where I find that the only cases in which the existence of such power is asserted or assumed, contain no reference to precedent authority, or reasons to support them, I cannot feel bound to consider the law to be so settled as to govern this case. Nor, in the course of the opinion now delivered by the court, does there seem to me to be such a train of reasoning, or reference to settled principles, as to overcome the weight of authority in the previous adjudications of this court.

In referring to the case of *Weston v. Charleston*, in 2 Pet. 463, wherein it was held, that a writ of error would lie, under the 25th section, to the refusal of a state court to award a prohibition ; I think the court has added to the strength of their own opinion, but little, if anything, in principle or authority ; for no order of a court partakes less of the character of a final judgment in a suit, than an order awarding or refusing a prohibition. In one case, an inferior court is ordered not to proceed to a judgment, but to

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surcease action in the cause ; in the other, it is left free to act ; but in either case, the only question is, whether the inferior court has jurisdiction ; if they have, it cannot be controlled in its exercise : if they have not, they can render no judgment ; the action of the superior court must necessarily be confined to jurisdiction, and its revision by this court can extend no further.

In the opinion in 2 Peters, no adjudged case at the common law, or in this court, is referred to ; its jurisdiction seems to be assumed more from the supposed necessity of its exercise, than from any principle of law, or provision in the judiciary act ; and no argument was had on this point, till it was directed by the court, after an argument on the merits at a preceding term ; for which reasons, I have been disposed rather to look to this case as a beacon, than to adopt it as a precedent. It has been, in my opinion unfortunate for this court, that the course of argument, in cases involving the momentous question of what are the proper subjects for the exercise of its appellate jurisdiction, has been so limited as it appears in the reports of its decisions on this subject. In tracing them back to the organization of the court, it will be found, that forty years had elapsed before there was a writ of error sustained on a prohibition ; more than thirty, before it was asserted that it would lie on a *mandamus* ; fifty, before it was acted on ; and that this is the first case in which it has been held to lie on a *habeas corpus*. This affords, it is true, no conclusive argument that the power exists only by assumption, because it has been so long dormant ; yet it affords the most powerful reasons for the most thorough consideration of a case, where its exercise is invoked for the first time, by a full research into the principles, the analogies, and the usages of law ; which define appellate power and its subjects, according to the common law applied to the judiciary act, which, by reference, adopts it as its basis.

There is great danger of error in bringing any case within the 22d or 25th sections, which is either without precedent in the common law, or opposed to its settled principles, still more so, when both objections apply as they do in the case of a prohibition ; for it will be found very difficult to exercise, under the judiciary act, any appellate power which is repudiated by the principles, usages and adjudged cases of the common law. And if it should so happen, that even on the fullest consideration, a single case of this description is acted upon, too much caution cannot be used in most thoroughly examining another case, supposed to be analogous ; *à fortiori*, where the first innovation was without argument, a partial or *ex parte* one, or one directed on second thought, after the merits of the case had been discussed. No safer course can be adopted than was taken in the case in 8 Wheat. 321-2, wherein the court would not sustain an unquestioned practice of thirty-four years, "by contemporaneous and long-protracted exposition," in the actual exercise of jurisdiction under the 25th section ; but justified it by a reference to "the reasons and policy" developed in that and the 22d sections, in conferring their appellate power. Had this course been taken in this, and the case of *Holmes v. Jennison*, by investigating the grounds on which a writ of error had been sustained on a prohibition ; instead of assuming that position as impregnable, then holding that the appellate power to revise the proceedings on a *mandamus* was a consequence resulting from its exercise in a case of prohibition ; and that the

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same power over a *habeas corpus* followed, as the conclusion from those premises, the final result would have been more satisfactory, if not entirely different. Where this chain will end no one can tell.

In forming my opinion in this, and the case of *Holmes*, I have been fully convinced, that it is founded on principles too well established by the adjudged cases, books of authority, and the decisions of this court, to be shaken by the case of *Weston v. Charleston*, or those which are dependent upon it; believing that that case rests alone on its own unsupported authority. I cannot recognise it as a basis for this, or the case of *Holmes*. Nor can I feel bound to consider the point as settled, so as to exclude further consideration, by reversing the course now taken by the court; and looking through the cases of *habeas corpus*, and *mandamus*, to the case of prohibition on which they rest, bringing the exercise of appellate power of this court over that case, to the test of the common law, the judiciary act, and the decisions of this court, cited in this, and the opinion in *Holmes's Case*, which have hitherto remained without notice, in argument or opinion, and consequently, not considered. When this course shall have been taken by the court, mine will conform to whatever conclusion may be adopted; but while those cases referred to by me continue unnoticed, my judgment will be guided by them as authoritative; and until they shall be reconsidered and overruled, I cannot but consider them to be more firmly rooted and planted in the law, more congenial to its principles, its policy, and the reasons on which it is founded, than any decisions which have been since made to the contrary. If the purposes of justice require a further expansion of our appellate power, it is the duty of congress to prescribe it, but while the law remains unchanged by legislative power, I cannot cease to deprecate the onward progress of jurisdiction, by step on step, from case to case, to which no limit seems assignable, so long as the emergency of a cause can be held to justify the assumed necessity for the exercise of that power, where it is not clearly within the provisions of the judiciary act.

CATRON, Justice.—Between the circuit court of this district, and the executive administration of the United States, there is an open contest for power. The court claims jurisdiction to coerce by *mandamus*, in all cases where an officer of the government of any grade refuses to perform a ministerial duty: and of necessity claims the right to determine, in every case, what is such duty; or whether it is an executive duty, when the power to coerce performance is not claimed. Where the line of demarkation lies, the court reserves to itself the power to determine. Any sensible distinction applicable to all cases, it is impossible to lay down, as I think; such are the refinements, and mere verbal distinctions, as to leave an almost unlimited discretion to the court. How easily the doctrine may be pushed and widened to any extent, this case furnishes an excellent illustration. The process of reasoning adopted by those who maintain the power to assume jurisdiction, is, that where a right exists by law to demand money of an officer, and he refuses to pay, the court can enforce the right by *mandamus*; and to ascertain the existence of the right, it is the duty of the court to construe the law: and if, by such construction, the right is found, and the refusal to pay ascertained to have been a mistake; then the officer will be coerced to pay out the money, as a ministerial duty. In most cases (as in

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this), the court will be called on to try a contest only fit for an action of *assumpsit*. First, it must ascertain the existence of the right, from complicated facts, and the construction of doubtful laws: this found, the duty follows; it being a duty, it is for the court to say, whether it is clear; if so, being an ascertained duty, and clear, then coercion, of course, would follow. That few cases of contested claims against the government would escape investigation, were these assumptions recognised, is free from doubt.

The great question, then, standing in advance of all others in this cause, and the only one I feel myself authorized to examine is the broad one, whether the circuit court of the district of Columbia, can, by a writ of *mandamus*, force one of the secretaries of the great departments, contrary to the opinion and commands of the president of the United States, to pay money out of the treasury? Mrs. Decatur claimed a double pension; a single one was paid by the secretary of the navy; she demanded the additional one, amounting to nearly \$20,000; the secretary refused to pay it; she then memorialized the president, and he concurred with, and affirmed the decision of the secretary, that the claim could not be allowed; and from this final decision of the executive department of the nation, Mrs. Decatur appealed, in the form of a petition *for a *mandamus*, to the circuit court of the district of Columbia, to reverse and annul the decision, [*519 made by the secretary, and sanctioned by the president. The court assumed jurisdiction, compelled the United States, through the secretary of the navy, to file a long answer; and in a tedious law-suit, to defend the United States. That he did so successfully, is of little consequence; the evil lies not in the loss of \$18,600 to the government, but in the concession by this court, that the circuit court of the district has the power to sit in judgment on the secretary's decision; to reverse the same, at its pleasure, and to order the money to be paid out of the treasury, contrary to his will, and to the will of the president, and that of all those intrusted by the constitution and laws with the safe-keeping of the public moneys.

Stripped of the slight disguise of legal forms, such is the case before us; the conflict between the executive and judiciary departments could not well be more direct, or more dangerous. The idea that they are distinct, and their duties separate, is confounded, if the jurisdiction of the court below is sustained; placing the executive power at its mercy, in case of all contested claims. Few can be more contested than the one before us; if jurisdiction can be exercised in this instance, it is difficult to see, in what others it does not exist; to establish which, we will briefly recapitulate the leading facts. On the 3d of March 1837, a resolution was passed by congress giving a pension of the half-pay of the late Captain Decatur, to the petitioner, his widow; and on the same day, a bill passed, giving an equal pension to all the widows of naval officers and seamen, who had died in the service; with this difference in the general law and the resolution, that by the former, the half-pay continued for life, and by the resolution only for five years, if the petitioner so long lived, and continued a widow. She claims by her petition, not only the half-monthly pay proper of a post-captain of the navy, but for daily rations, eight, at twenty-five cents each, amounting to one-half of \$730 per annum; and also interest on the sum withholden. These claims for back rations and interest are contrary to the construction given by the government to the navy pension acts, for more than forty years. To cover

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a failure, should the court concur with the executive departments in rejecting these claims, the petition has a double aspect, in the form of a bill in equity ; first, praying for the whole sum of \$18,597 ; or such part or portion thereof as the court may direct. It was first called on to decide whether the United States owed the petitioner anything ; secondly, how much ; and, thirdly, whether there was any money in the treasury belonging to the navy fund, out of which the claim could then be satisfied.

The secretary answers, he had money enough of the fund at his control, when he made the answer, if the old construction was adhered to by the court ; but if he was adjudged to pay the petitioner *for rations and *520] interest, then all other widows and orphans provided for by the various acts of congress, and entitled to half-pay out of the fund, would likewise be entitled to come in for half rations and interest ; in which case, he would not have money to pay the claim, but that the fund would be greatly in arrear. A more complicated and difficult law-suit than is found in this cause, rarely comes before a court of justice ; and to be compelled to defend which, the secretary protests ; “because such jurisdiction in this court would, if assumed, operate as such an inference with the discharge of the official duties of the undersigned, as to make it impossible for him to perform them as required and intended ; and would transfer to the said court the discharge of the said duties, and the whole management and disposition of the said fund ; and subject all applicants for pensions to the delay, expense and embarrassments of legal controversies as to their rights, and to a suspension of the provisions to which they might be entitled under the laws, till these controversies were judicially decided. Because such a jurisdiction in the circuit court would make the United States suable in that court ; and subject the money of the United States, in the treasury of the United States, to be taken therefrom by the judgments of said court. Because, if the circuit court assumes the jurisdiction of compelling the secretary of the navy, or the head of any other department to revise and reverse the decisions that may have been made by their predecessors in office, these officers will necessarily be taken off from the discharge of their immediate and most urgent public duties, and made to apply their time and attention, and that of the clerks in the departments, in an endless review and reconsideration of antiquated claims and settled questions ; to the delay and hinderance of measures of vital importance to the national welfare and safety. For these and other reasons which he trusts will be obvious, on further consideration, to the court, he respectfully objects to the jurisdiction assumed in this case ; and will now proceed, under such protest, to show cause why the *mandamus* prayed for should not be issued.” He was, however, compelled to defend the suit, and defeated the claim upon its merits ; the discussion of which took up two days in this court.

But the great question was decided below, that the court had jurisdiction and power to order money to be paid out of the treasury of the United States, by a writ in the nature of an execution, running in the name of the United States, commanding the government to obey its own authority ; this prominent feature of the writ demanded, it is impossible to disguise. That no other federal circuit court in the Union has power to issue such a writ, was recognised as settled in the case *Kendall v. United States*, by this court, in 1838. The power claimed is confined to this ten miles

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square. And what is the extent of the *power? To overrule the decisions of the five great departments, and of the president, extending to the payment of money, the delivery of commissions, and innumerable other matters involved in the complicate operations of this government, amounting each year to a hundred thousand separate transactions, to say the least : the validity of all debatable and contested claims are holden to be subjected to the ordeal, and, on their rejection, to the supervision of the circuit court of this district. Beyond doubt, this is the breadth of the assumption of jurisdiction put forth by the cause before us. The entertaining such a cause is calculated to alarm all men who seriously think of the consequences. It is an invitation to all needy expectants, with pretensions of claim on the government, to seek this superior and controlling power (the circuit court of this district), and invoke its aid to force their hands into the treasury, contrary to the better judgment of the guardians of the public money. Thousands of claims exist, quite as fair on their face, and as simple in their details, as is this of Mrs. Decatur's, that have been rejected. She has been allowed to appeal to the court, and been heard ; and so can all others. The assumption of power need not be pushed further, to let suitors enough into the court to consume the time and absorb the attention of the secretaries ; a principal business of theirs presently must be, to sit at the bar of the court to ward off its mandate, and keep its officers from forcing the money out of the public treasury, unless this court arrests the attempt : whether well or ill intended, is aside from the purpose ; the assumption and exercise of the power, is equally poisonous in its consequences to the country ; it takes from the hands of those, the administration of public affairs, that the laws and the people of this nation have intrusted with them ; it brings to the bar of the court, the nation itself ; for it cannot be denied, that the United States government is the real defendant in this cause ; and that if it was cast, it would be forced (on this cause being remanded for execution) to open the treasury according to the dictates of the circuit court.

The origin of the opinion that the public money could be reached through such instrumentality is of recent date ; its history will be found in the case of *Kendall v. United States*. Money was not there asked in a direct form ; and the court put the case upon the express ground, that the defendant " was not called upon to furnish the means of paying any balance that was awarded against the department by the solicitor of the treasury. He was simply (say the court) required to give the credit ;" and this was no more an official act, than the making of an entry by a clerk, by order of a court of justice ; it was, in every just sense, a mere ministerial act. 12 Pet. 614. Had it not been placed on this narrow ground, the decision could not have been made. That it falls short of this case, is admitted ; still, it was then manifest, that the attempt to push the doctrine of ministerial duties further, so as to reach the money in the treasury, would follow ; the case has occurred, and must be met.

*I maintain, that the executive power of this nation, headed by the president, and divided into departments in its administration of the finances of the country, acts independently of the courts of justice, in paying the public creditors ; and that the decision of the secretary of the navy in this case, affirmed by the president, under the advice of the attorney-

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general, was final, on the laws as they stood ; and that the petitioner could only appeal to congress.

And here it may be safely asked, whether the secretary and president, the latter elected by the nation and responsible to the people directly, and to their representatives in congress, each exercising an undoubtedly legitimate authority, were not the safest and best to decide on the rights of the nation, and of the petitioner seeking justice at its hands? Is the country known, that submits the administration of its finances to the courts of justice, or permits them to control the operations of the treasury? What guarantee have the people of this country that the circuit court of this district will as faithfully perform the functions they have assumed, when dealing out the public money to satisfy rejected claims, as the heads of the departments? The court is wholly irresponsible to the people for its acts—is unknown to them ; the judges hold appointments of an ordinary judicial character, and are accidentally exercising jurisdiction over the territory where the treasury and public officers are located. Furthermore, for nearly forty years, this fearful claim to power has neither been exerted, nor was it supposed to exist ; but now that it is assumed, we are struck with the peculiar impropriety of the circuit court of this district becoming the front of opposition to the executive administration.

Every government is deemed to be just to its citizens ; its executive officers, equally with the judges of the courts, are personally disinterested ; and why should not their decisions be as satisfactory and final. They must be final, in most instances, in the nature of things, and the necessities of the government. Money is appropriated for certain objects ; none can be drawn from the treasury save according to some law ; of the obligations, the departments must judge in a prompt manner ; they cannot await years of litigation to learn their duties, and the responsibilities of the governments from the courts ; the secretary of the navy could not subject to want and miseries the whole of the widows and orphans on the navy pension list, until he was informed by the court of this district, whether Mrs. Decatur should be paid her claim for rations and interest ; he had to proceed, as for forty years and more his predecessors had done, and pay out upon the old construction ; nor could the government submit to its alteration, for the arrearages would have exhausted the fund, possibly for the next ten years, and left most of the widows and orphans dependent upon it for daily bread, in utter destitution. To permit an interference of the courts of justice with the accounts and affairs of the treasury, would soon sap its very foundations ; money would not be drawn out according to its own rules, nor could the secretary of the treasury ever inform *congress of the
 *523] amount needed. Congress would, of necessity, be compelled to consult the court, not the secretary, when making appropriations. This case again furnishes the illustration : if the courts were to hold that Mrs. Decatur should be paid the \$18,597, and that the true construction of the acts of congress was, that the widows and orphans pensioned on the navy fund should receive, in addition to the half-monthly pay, half rations, and interest on the arrearages ; then an addition of, possibly, a million to the fund would be required.

For these and other reasons, the court below had no jurisdiction of the subject-matter ; and, of course, no authority to issue the *mandamus* to bring

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the secretary before it : and therefore, I hold the suit must be dismissed, and the judgment affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel : On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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Certificate of division.

Action in the district court of the United States for the southern district of New York, by the United States, against the defendant, for a penalty, under the act of 1838, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam;" a verdict was rendered for the United States, and without a judgment on the verdict, the case was, by consent, removed to the circuit court of the United States. In the circuit court, certain questions were presented on the argument, and a statement was made of those questions, and they were certified, *pro forma*, at the request of the counsel for the parties, to the supreme court, for their decision; no difference of opinion was actually expressed by the judges of the circuit court. The judgment or other proceedings on the verdict ought to have been entered in the district court; it was altogether irregular to transfer the proceeding in that condition to the circuit court. The case was remanded to the circuit court.

In some cases, where the point arising is one of importance, the judges of the circuit court have, sometimes, by consent, certified the point to the supreme court, as upon a division of opinion; when in truth they both rather seriously doubted, than differed about it; they must be cases sanctioned by the judgment of one of the judges of the supreme court, in his circuit.

CERTIFICATE of Division from the Circuit Court for the Southern District of New York. An action of debt was instituted in the district court for the southern district of New York, by the United States, against the defendant, as master of the steamboat New York, to recover the penalty of \$300 imposed by the ninth section of the act of congress, of the 7th of July 1838, entitled, "an act for the better security of the lives of passengers on board vessels propelled in whole or in part by steam." The cause was tried in the district court, in June 1839.

On the trial of the cause in the district court, exceptions were taken by the counsel for the defendant to the decision of the court, on questions of evidence which arose in the trial. Evidence was offered by the defendant, which was overruled by the court; to which decisions, the counsel for the defendant also excepted. The district judge charged the jury in favor of the plaintiffs, on a case agreed upon; but for the more full consideration of the questions in the cause, he recommended, with the consent of the counsel on both sides, that the jury should find a verdict for the plaintiffs, subject to the opinion of the court, upon a case to be made; with leave to either party to turn the same into a bill of exceptions or special verdict. Upon which the jury found such verdict, accordingly. No judgment was entered on the verdict; but by consent of the counsel in the cause, it was transferred to the circuit court, without any other proceedings in the district court.

The record stated, that on the argument of the cause, the circuit court were divided in opinion on questions presented on the argument of the counsel for the plaintiffs and the defendant; and at the *request [*525]

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of the counsel for the parties, they were ordered to be certified to the supreme court for their decision. This division of opinion was in fact made *pro formâ*, and for the purpose of obtaining the opinion of the supreme court on the points certified.

For the United States, *Gilpin*, Attorney-General ; for Samuel B. Stone, *Sullivan*, who submitted a printed argument. The case was not argued, it having been remanded to the circuit court.

TANEY, Ch. J., delivered the opinion of the court.—The court have examined the record in this case, and it is evident, that in the form in which it comes before us, we have no jurisdiction. The suit appears to have been brought in the district court, and to have been carried on in that court until a verdict was rendered. It was then, by consent of counsel, transferred to the circuit court, precisely in the state in which it then was ; and a division of opinion then entered, *pro formâ*, to send the case to this court. All of this appears on the record ; and is exceedingly irregular. The suit was brought originally in the district court, and the verdict rendered there. The judgment or other proceeding on that verdict, ought to have been entered there also ; and it was altogether irregular, to transfer the proceedings, in that condition, to the circuit court.

We are aware, that in some cases, where the point arising is one of importance and difficulty, and it is desirable, for the purposes of justice to obtain the opinion of this court, the judges of the circuit court have sometimes, by consent, certified the point to this court, as upon a division of opinion ; when, in truth, they both rather seriously doubted, than differed about it. We do not object to a practice of this description, when applied to proper cases, and on proper occasions. But they must be cases sanctioned by the judgment of one of the judges of this court, in his circuit. A loose practice in this respect might render this court substantially a court for the original decision of all causes of importance : when the constitution and the laws intended to make it altogether appellate in its character ; except in the few cases of original jurisdiction enumerated in the constitution. The case, as sent here, involves a constitutional question, which is argued at some length in the printed brief ; and this furnishes a still stronger objection to the manner in which the point is brought before us. It would hardly be proper for this court to express opinions upon constitutional questions ; when it appears, clearly, by the record that there is no suit legitimately before it. The case is therefore remanded to the circuit court for further proceedings, according to law.

The case of the *United States v. Charles A. Woolsey*, having been sent here in like manner ; must also be remanded for the reasons above stated.

*UNITED STATES, Plaintiffs in error, *v.* JOHN P. GRATIOT, ROBERT BURTON, CHARLES S. HEMPSTEAD and DICKERSON B. MOOREHOUSE, Defendants in error.

Lead-mines.

The United States instituted an action on a bond given by the defendants, conditioned that certain of the obligors, who had taken from the agent of the United States, under the authority of the president of the United States, a license for smelting lead-ore, bearing date September 1st, 1834, should fully execute and comply with the terms and conditions of a license for purchasing and smelting lead-ore, at the United States' lead-mines, on the Upper Mississippi river, in the state of Illinois, for the period of one year. The defendants demurred to the declaration, and the question was presented to the circuit court of Illinois, whether the president of the United States had power, under the act of congress of 3d of March 1807, to make a contract for purchasing and smelting lead-ore, at the lead-mines of the United States, on the Upper Mississippi; this question was certified from the circuit, to the supreme court of the United States: *Held*, that the president of the United States had power, under the act of congress of 3d of March 1807, to make the contract on which this suit was instituted.

The power over the public lands is vested in congress by the constitution, without limitation, and has been considered the foundation on which the territorial governments rest. *McCulloch v. State of Maryland*, 4 Wheat. 422; and *American Insurance Company v. Canter*, 1 Pet. 542, cited.

The words "dispose of" the public lands, used in the constitution of the United States, cannot, under the decisions of the supreme court, receive any other construction than that congress has the power, in its discretion, to authorize the leasing of the lead-mines on the public lands in the territories of the United States. There can be no apprehension of any encroachments upon state rights, by the creation of a numerous tenantry within the borders of the states, from the adoption of such measures.

The authority given to the president of the United States to lease the lead-mines, is limited to a term not exceeding five years; this limitation, however, is not to be construed as a prohibition to renew the leases from time to time, if he thinks proper so to do; the authority is limited to a short period, so as not to interfere with the power of congress to make other dispositions of the mines, should they think the same necessary.

The legal understanding of a lease for years, is a contract for the possession and profits of land, for a determinate period, with the recompense of rent; it is not necessary that the rent should be in money; if reserved in kind, it is rent, in contemplation of law.

The law of 1807, authorizing the leasing of the lead-mines, was passed before Illinois was organized as a state; she cannot now complain of any disposition or regulation of the lead-mines, previously made by congress; she surely cannot claim a right to the public lands within her limits.

CERTIFICATE of Division from the Circuit Court of Illinois.¹ On the first day of September 1834, the defendants entered into the following bond to the United States, having executed the same under their respective hands and seals:

"Know all men, by these presents, that we, J. P. B. Gratiot, Robert Burton, D. B. Moorehouse and Charles S. Hempstead are holden and stand firmly bound unto the United States of America, or their certain attorney, in the penal sum of ten thousand dollars, current money of the United States, well and truly to be paid unto their treasury; for which payment, well and truly to be made, we, the said J. P. B. Gratiot, Robert Burton, D. B. Moorehouse and Charles S. Hempstead do hereby, jointly and severally, bind ourselves, our heirs, executors and administrators, and each of every of them, jointly, severally and firmly, by these presents. [*527]

¹ For the opinion of Justice McLEAN, in the circuit court, see 1 McLean 454.

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Signed with our hands, and sealed with our seals, this day of September, in the year of our Lord 1834. The condition of the above obligation is such, that whereas, the said J. P. B. Gratiot and Robert Burton, have obtained from the agent of the United States a license, bearing date the first day of September 1834, containing stipulations therein more particularly described, to smelt lead-ore. Now, if the said J. P. B. Gratiot and Robert Burton shall faithfully and fully execute and comply with the terms and conditions set forth in said license, then and in that case, this obligation to be void and of no effect, otherwise, to remain in full force and virtue."

At the same time, a paper called a "license for smelting," which was executed by Thomas C. Legate, major of the United States army, superintendent of the lead-mines, J. P. B. Gratiot and Robert Burton, under their hands and seals, was delivered to J. P. B. Gratiot and Robert Burton, by Major Legate.

"This indenture, made and entered into this first day of September 1834, between Major T. C. Legate, superintending the United States lead-mines, acting under the direction of the secretary of war, of the first part, and J. P. B. Gratiot and Robert Burton, of the second part, witnesseth: That the said party of the second part is hereby permitted, by and with the approbation of the president of the United States, to purchase and smelt lead-ore, at the United States' lead mines, on the Upper Mississippi, for the period of one year, from and after the date hereof, upon the following conditions, viz: 1. All purchases, or other acquisitions of ore, ashes, zinc or lead, to be from persons authorized to work the mines, either as lessees, smelters or diggers, and from no others; and no ore to be purchased from the leased premises of any person, without his permission. 2. To commence smelting as soon as 100,000 pounds of ore are obtained, and to continue it so long as any is on hand; to weigh a charge of ore for the log furnace, and the lead produced from it, when required to do it by the said first party, or his assistant. 3. To keep a book containing an accurate account of all ore, ashes or zinc, purchased or otherwise acquired, and of all lead manufactured; which book shall, at all times, be open to inspection of the said first party, or his assistant; and to furnish a transcript or return at the end of every month (agreeably to a form furnished by the said first party); which book and returns to be verified, on oath, if required. 4. The said second party hereby agrees to pay the first party, for the use of the United States, six pounds of every hundred pounds of all the lead smelted by him, under this *528] indenture, to be *paid monthly, in clear pure lead, at the wareroom on Fever river, or at such other place near the mines as the said first party shall direct, and free of expense to the United States. And the said second party is not to sell, or remove from the places of smelting, in any manner whatever, any lead, until the rent be paid as aforesaid. This condition is subject to the revocation of the government, upon giving three months' previous notice; at which time, it will be optional with the licensee to accept or refuse the new terms. Upon his refusal to accept, then this license shall cease and determine. 5. The second party is allowed to have as much fuel as will suffice, without waste, for the purpose of this indenture; and to cultivate as much land as will suffice to furnish his teams, &c., with provender. 6. It is understood and agreed between the aforesaid parties, that the said second party shall not employ, in any manner, any

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smelter, lessee or miner, who has forfeited his license, lease or permit to mine, nor any other person who is at the mines without the authority of the said first party; and the said second party agrees not to employ or harbor the laborers of workmen of another smelter. Sixty days are allowed after the expiration of this license, to close all business under it; but it is understood that no purchase or hauling of ore is to take place, after the license is expired. The bond given for the faithful performance of the contract is to be in full force and virtue until a written settlement is made. It is distinctly understood by the said parties, that upon proof being afforded to the first party, that either of the foregoing stipulations have been violated or not complied with, he may declare this indenture null and void, and re-enter and take possession of all the premises, as if no such agreement existed."

In the circuit court of the United States for the district of Illinois, the United States instituted an action of debt, to December term 1836, against the defendants, on this bond. The declaration set forth the bond and condition, and recited the license or contract therein mentioned, and averred that the lessees had, by virtue of the lease, smelted 2,400,000 pounds of lead, but had failed to execute the conditions stipulated on their part, by altogether refusing to pay to the superintendent, for the use of the United States, the six pounds for every hundred pounds so smelted.

The defendants demurred to the declaration, after *oyer* of the bond and license for smelting; and on the argument of the demurrer, the following question arose, upon which the judges of the circuit court were divided in opinion, and directed it to be certified to this court: "Whether the president had power, under the act of the 3d of March 1807 (2 U. S. Stat. 449), to make the contract set forth in the declaration."

The case was argued for the United States, by *Gilpin*, Attorney-General; and by *Benton*, for the defendants.

* *Gilpin*, for the United States.—These lead-mines (the United States lead-mines on the Upper Mississippi) are situated on Fever [529 river, partly within the northern portion of the state of Illinois, and partly in the territory of Wisconsin. They are, of course, within "the territory north-west of the river Ohio," ceded by Virginia to the United States, by the deed of cession, dated 1st March 1784 (1 Story's Laws 472) which deed ceded "the soil as well as the jurisdiction." In consequence of that cession, the old congress passed their ordinance of 20th May 1785 (Ibid. 563), for the survey and sale of the ceded lands. That ordinance, after directing the land to be surveyed into lots of one mile square, and all "springs, mines," &c., to be noted, authorized their exposure to public sale; but it directed that from such sale there "should be reserved, for the United States, four lots in each township;" and also, "one-third part of all gold, silver, copper or lead mines, to be sold or disposed of as congress should afterwards direct." The ordinance of 9th July 1788, which repealed some portions of that of 1785, left these provisions in full force, up to the formation of the constitution.

The third section of the fourth article of the constitution provides, that "congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the

United States." This clause was legislated upon by the act of 18th May 1796 (1 U. S. Stat. 464), which provided for the survey and sale of a large portion of the north-western territory. In the second section of that act, the surveyors were directed to note "all mines, salt-licks, salt-springs, and mill-seats;" and by the third section, every salt-spring, and a mile square around it, and certain central sections of every township, were excluded from sale, and "reserved for the future disposal of the United States." On the 10th May 1800 (2 Ibid. 73), an act supplementary to this was passed, which expressly provided, "that the lands of the United States, reserved for future disposition, might be let on leases by the surveyor-general, for terms not exceeding seven years." When Ohio was formed into the first state in the north-western territory, congress stipulated, by the acts of 30th April 1802, and 3d March 1803 (Ibid. 173, 225), that the reserved sections, and certain other sections of land then unsold, should be granted to the inhabitants for the use of schools, and that the legislature should hold them in trust for that exclusive purpose; that the reserved salt-springs should be granted "for the use of the people of the state," under such regulations as the legislature should direct; and that the same should never be sold, nor leased for a longer period than ten years." In the following year, an act was passed providing for "the disposal of the public lands in the Indiana territory," embracing therein the whole public domain from the boundary of the state of Ohio to the Mississippi, and reserving therein (Ibid. 343) a section in each township for schools, and "the several salt-springs in the said territory, together *with as many contiguous sections to each as *530] might be deemed necessary by the president, for the future disposal of the United States." In 1807, an act was passed (Ibid. 445), to prevent settlements on the public lands which "had not been previously sold, ceded or leased" by the United States; but a provision was made in favor of such persons as had actually settled on them, by suffering them to remain, with the approbation of the president, as "tenants at will," on tracts not exceeding 320 acres; provided, however, that where any such tract "included either a lead-mine or a salt-spring, no permission to work the same should be granted, without the approbation of the president, who was authorized to cause such mines or springs to be leased for a term not exceeding three years." Finally, on the 3d March 1807, it was expressly provided (Ibid. 449), that all the lead-mines in the Indiana territory, with as many sections contiguous to each as were deemed necessary, should be reserved for future disposal; and the president has "authorized to lease any lead-mine which had then or might thereafter be discovered in that territory, for a term not exceeding five years." This provision remained in full force, and unrepealed, up to the time when the present suit was instituted. It will thus be seen, that, from the cession of the north-western territory, without interruption, down to 1807, congress practised and sanctioned the plan of reserving from sale certain portions of the public domain; that they held them during an indefinite period, for future disposition; and that this disposition consisted, either in selling them, when no further reason for reserving them existed, or in ceding them to the states, on certain conditions; or in leasing them, under the control of the executive, for short periods. This plan has been recognised by repeated subsequent enactments, at least as late as the year

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1832. (2 Story 1076, 1243, 1501 ; 3 Ibid. 1764, 1930 ; 4 Ibid. 2136, 2140, 2259, 2264.)

The United States' lead-mines on the Upper Mississippi, being within the Indiana territory, were early reserved from sale ; and in pursuance of the act of 3d March 1807, leased for limited terms, under the direction of the president. At first, the leases included particular mines, or lots of ground ; but subsequently, the practice was introduced of leasing to some individuals the right to dig the ore on the reserved land, and to others the right to smelt it. Under this practice, the contract set forth in the declaration was made. It consisted of two instruments : the one was an agreement made between the superintendent of the lead-mines, " acting under the direction of the secretary of war," and " by and with the approbation of the president," and two of the defendants ; by which they were " permitted to purchase and smelt lead ore, at the mines, for the period of one year," paying therefor to the United States " six pounds of every hundred pounds of all the lead so smelted, at the wareroom on Fever river ;" and also to have the necessary fuel, and to cultivate as much land as sufficed for the provender of their *teams ; the agreement was to be void, and the United States to have the right of immediate re-entry and possession, on non- [*531 compliance with these terms. The other instrument was an accompanying bond, referred to in the agreement, with security conditioned for the fulfilment of these terms.

On the trial, the question arose " whether the president had power, under the act of 3d March 1807, to make this contract." That the lands in question were " lead mines in the Indiana territory," is not denied. That they were reserved from sale, is also admitted. That the contract was the act of the president, since it was made by a duly-authorized agent, acting within the scope of his authority, is not disputed. *Wilcox v. Jackson*, 13 Pet. 513. The only point, therefore, in controversy is, whether or not this contract is such an agreement as congress meant, when they authorized the president " to lease any lead-mine for a term not exceeding five years." A lease is a grant of the possession and usufruct of real estate, for a limited term, in consideration of a certain rent. This contract is in all respects such a grant ; the lessee has the use of the land for cultivation and fuel, so far as it is needed ; he has the use of the ore for the purpose of smelting ; he is bound to pay a certain rent ; and the grantors have a right of re-entry on certain contingencies. These are the incidents of a lease. Nor is it less a lease, because a right to dig ore on the same premises may be granted to another. There is nothing in such a division of the profits of the leased land, which impairs or changes the nature of the contract. The duration of the term is in accordance with the act of congress, for it is only for a single year. The contract, therefore, is such a lease as the president had authority to make.

It has been contended, that the constitution confers no power to make such a contract, under the authority given to congress to dispose of, and make rules and regulations respecting, the public territory ; that the power of sale, and of such previous measures as are necessary for that purpose, and for ascertaining the value of the lands, is all the constitution confers ; and that to grant leases might have the effect of establishing a permanent tenantry within the states. To this it may be answered, in the first place, that these considerations do not present themselves in the question now before

this court ; they may be proper for the examination of the circuit court, on the further trial of the cause ; but the only point here submitted is, whether or not the contract in question is a lease. Nor can the objections be sustained in themselves. If they have force, they apply against all reservations ; much more, indeed, against such as are made for fortifications or public works, than these of the lead-mines, since they are permanent ; while these are, by their terms, merely reserved "for future disposal." Now, it has been seen, that the right of reservation has been exercised and acknowledged, without intermission, from the cession of the domain to the present time ; before the constitution was formed, as well as *532] since. Even for the *admitted purpose of examination—for the prevention of a useless sacrifice of the lead-mines—this course may be expedient. Nor can it be doubted, that such a power is within the language of the constitution. That language is unusually broad : "to dispose of, and to make all needful rules and regulations" respecting the public domain. Surely, a power of lease, for a limited time, is embraced in language as broad as this. It has been held by this court to give the widest scope to the action of congress. *McCulloch v. State of Maryland*, 4 Wheat. 422 ; *American Ins. Co. v. Canter*, 1 Pet. 542. Under it, territorial governments of vast expense and complicated political powers have been formed ; the whole management of the public domain rests upon these few words ; lands have been ceded for special purposes ; limitations have been fixed on the sovereign powers of the states ; school lands are set aside ; timber and salt-springs are kept for public use ; and the spots on which many of our fortifications and public buildings are placed, are permanently secured. All this has been done, in repeated instances, for nearly sixty years. To confine the language of the constitution, therefore, to a mere delegation to congress of a power to sell the territory, or to examine and prepare it for sale, is evidently an unwarranted restriction upon it. If a wider authority be conferred, none would seem more legitimate than this limited and restricted power of leasing, for short periods, the mines that might, from time to time, be discovered. The inference, that it would lead to the establishment of a numerous tenantry, within the states, is less an argument on the language of the constitution than a supposition that congress might wantonly abuse a delegated trust ; it might be used with equal force against all the clauses of the constitution, which give power to that body.

If, therefore, it be clear, that the contract in question is a lease, within the legal acceptance of the term, and the intention of the particular act, it is submitted, that there is nothing in the constitution, or in the previous or subsequent legislation of congress respecting the public domain, which made the execution of it improper or invalid.

Benton, for the defendants.—The position has been assumed by the attorney-general, that the United States may enter into the broad business of leasing the public lands ; and, by consequence, that the president may have as many tenants on the public lands of the United States, as he shall desire ; that he may lease in perpetuity, and have those tenants to the extent of time. Such a power is solemnly protested against. No authority in the cession of the public lands to the United States is given, but to dispose of them, and to make rules and regulations respecting the prepara-

tion of them for sale ; for their preservation, and their sale. As to the power to lease, which is claimed for the United States, what would the states have said, when the cession of these lands *was made and accepted, [*533 if it had been declared, that the president could lease the lands ; and that, sixty years afterwards, this court would be engaged in enforcing a lease given by the United States of part of the lands then to be ceded ? Would the lands have been granted, if congress were to have the power to establish a tenantry to the United States upon them ? The state-rights principles would have resisted this ; no lands would have been ceded.

The clause in the constitution of the United States, relative to the public lands, will govern this question ; and the deeds of cession go with the provisions of the constitution. The lands are "to be disposed of" by congress ; not "held by the United States." No question can be raised on the construction of the provision of the constitution relative to the public lands. The constitution gives the power of disposal ; and disposal is not letting or leasing. The power to make rules and regulations, applies to the power to dispose of the lands. The rules are to carry the disposal into effect ; to protect them ; to explore them ; to survey them. Congress have always treated the public lands on these principles.

Formerly, the lead-mines in the now state of Missouri were leased. This was while a territorial government existed there ; when Missouri became a state, opposition was made to the system, and to the practice under it. They were successfully resisted, and the whole system was driven out of the state of Missouri. In that state, there is no longer a body of tenantry, holding under leases from the United States. The practice of leasing the lead-mines then went into the territory of the United States above Missouri—into the territory of Illinois. It was resisted there, but ineffectually ; this resistance cannot be sustained in a territory, with equal force, as it can be in a state. Illinois has become a state ; and she will no longer allow this use of the public lands within her boundaries. 1. Congress has no power to give or authorize leases of the public lands, and to obtain profits from the working of the mines upon them. 2. Congress cannot delegate this power. 3. Congress has made no rule or regulation by which the contract on which this action is brought can be maintained.

In arguing these points it is insisted : 1. That the first act of March 3d, 1807, ch. 101, giving the president authority to lease lead-mines, applies only to lands ceded to the United States by the Louisiana treaty, and to persons who had settled on such lands, previous to the passage of the act ; and was merely intended to induce such persons to acknowledge the title of the United States, and to become its tenants ; and to give quiet possession, at the end of the lease, to the United States. 2. That the second act of March 3d, 1807, ch. 104, giving the president authority to reserve, for the future disposition of congress, the lead-mines of Indiana, and as many contiguous sections of land *as he should think proper, and to lease the same for a limited period, was clearly intended to cause the mines to [*534 be explored, and their value ascertained, that congress might afterward dispose of them, with a knowledge of their value ; and that the act contains no authority for any such license for smelting lead, with or without its various onerous conditions, which forms the foundation for the contract disclosed in the record.

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This act is limited to five years. It is not to be tolerated, that this limitation is to be defeated by the renewal of the leases. The leases are to be given for mines which may be discovered. This is discovery by the surveyors of the United States. No mines are to be leased, but those which may thus become known. Private persons cannot seek for them, and then take leases of them. The law provides, that the "reserved lead-mines" may be leased. But no lead-mines have been reserved in the state of Illinois; and in the declaration, there is no averment that there has been such a reservation. The case before the court is not, therefore, within the provisions of the act of congress; if the construction of the constitution and the law shall, in the opinion of the court, be such as would authorize leasing the lands of the United States. Those who execute a law, are to show that they are within its terms; agents are to act within the granted authority. The agents of the government of the United States must show that the act of congress has been followed.

To show that the agent of the United States has not followed his authority, will be to show it has not limited his authority. He styles himself "agent of the United States' lead-mines." This is the assertion of an agency over all the world! Where is the law authorizing the appointment of a superintendent of the lead-mines? There is no law, nor is there an averment in the pleadings of such an authority. The action of the agent is set forth, in the record; not that he has granted a lease, but that he has granted a license. A license is not authorized. The license does not locate the person to whom it is given in any particular place. It gives him a right to go where he pleases. This is contrary to the usual forms of the law, and it interferes with the provisions of the land laws. The license is not to work mines; but "to purchase ore" "and lead," "and timber." All this is unauthorized by the acts of congress. It is a clear case on the policy of the law, and it is clear on the terms of the statutes, that the authority to lease is not given, and its exercise is invalid. 5 Am. State Papers 460.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up from the circuit court of the United States for the district of Illinois. It is an action of debt, founded on a bond given by the defendants to the United States, in the penalty of \$10,000, bearing date the 1st of September *535] 1834, with a *condition thereunder written, for the performance of certain covenants or stipulations contained in an indenture referred to, and bearing even date with the bond, and called a license for smelting lead. The declaration sets out the condition of the bond, with the parts of indenture referred to, upon which breaches are alleged; and then assigns the breaches. The defendants crave *oyer* of the bond, and the instrument or indenture referred to in the condition, and they are read to him as follows:

"Know all men, by these presents, that we, J. P. B. Gratiot, Robert Burton, D. B. Moorehouse and Charles S. Hempstead are holden and stand firmly bound unto the United States of America, or their certain attorney, in the penal sum of ten thousand dollars, current money of the said United States, well and truly to be paid into their treasury; for which payment, well and truly to be made, we, the said J. P. B. Gratiot, Robert Burton, D. B. Moorehouse and Charles S. Hempstead do hereby, jointly and sever-

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ally, bind ourselves, our heirs, executors and administrators, and each and every of them, jointly, severally and firmly, by these presents. Signed with our hands, and sealed with our seals, this first day of September, in the year of our Lord 1834. The condition of the above obligation is such, that whereas, the said J. P. B. Gratiot and Robert Burton have obtained from the agent of the United States a license, bearing date the first day of September 1834, containing stipulations therein more particularly described, to smelt lead ore: Now, if the said J. P. B. Gratiot and Robert Burton shall faithfully and fully execute and comply with the terms and conditions set forth in said license, then and in that case, this obligation to be void and of no effect, otherwise to remain in full force and virtue.

"Witnesses present:

GEO. GOLDTHORP,

PETER AYDELOTT,

ABRAHAM BLAYLEN."

J. P. B. GRATIOT, [SEAL.]

ROBERT BURTON, [SEAL.]

CHS. S. HEMPSTEAD, [SEAL.]

J. B. MOOREHOUSE." [SEAL.]

LICENSE FOR SMELTING.

"This indenture, made and entered into this first day of September 1834, between Major T. C. Legate, superintending the United States' lead-mines, acting under the direction of the secretary of war, of the first part, and J. P. B. Gratiot and Robert Burton, of the second part, witnesseth: That the said party of the second part is hereby permitted, by and with the approbation of the president of the United States, to *purchase and smelt lead-ore at the United States' lead-mines, on the Upper Mississippi, [536 for the period of one year, from and after the date hereof, upon the following condition, viz: 1. All purchases or other acquisitions of ore, ashes, zinc or lead, to be from persons authorized to work the mines, either as lessees, smelters or diggers, and from no others; and no ore to be purchased from the leased premises of any person, without his permission. 2. To commence smelting as soon as 100,000 pounds of ore are obtained, and to continue it so long as any is on hand; to weigh a charge of ore for the log-furnace, and the lead produced from it, when required to do it by the said first party or his assistant. 3. To keep a book containing an accurate account of all ore, ashes or zinc purchased, or otherwise acquired, and of all lead manufactured; which book shall, at all times, be open to inspection of the said first party or his assistant; and to furnish a transcript or return, at the end of every month, agreeably to a form furnished by the said first party; which book and returns to be verified on oath, if required. 4. The said second party hereby agrees to pay the first party, for the use of the United States, six pounds of every hundred pounds of all the lead smelted by him, under this indenture, to be paid monthly, in clear pure lead, at the wareroom on Fever river, or at such other place near the mines as the said first party shall direct, and free of expense to the United States. And the said second party is not to sell, or remove from the place of smelting, in any manner whatever, any lead, until the rent be paid as aforesaid. This condition is subject to the revocation of the government, upon giving three months' previous notice; at which time, it will be optional with the licensee to accept or refuse the new terms. Upon his refusal to accept, then this license shall cease and determine. 5. The second party is allowed to have as much fuel as will suffice, without waste, for the purpose of this

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indenture, and to cultivate as much land as will suffice to furnish his teams, &c., with provender. 6. It is understood and agreed between the aforesaid parties, that the said second party shall not employ, in any manner, any smelter, lessee or miner, who has forfeited his license, lease or permit to mine, nor any other person who is at the mines, without the authority of the said first party; and the said second party agrees not to employ or harbor the laborers or workmen of another smelter. Sixty days are allowed, after the expiration of this license, to close all business under it; but it is understood, that no purchase or hauling of ore is to take place, after the license is expired. The bond given for the faithful performance of the contract is to be in full force and virtue, until a written settlement is made. It is distinctly understood by the said parties, that, upon proof being afforded to the first party, that either of the foregoing stipulations have been violated or not *537] complied with, he may declare this indenture null and void, and re-enter and take possession of all the premises as if no such agreement existed.

"Witnesses present :

GEO. GOLDTHORP,

PETER AYDELOTT,

ABRAHAM BLAYLEN."

THO. C. LEGATE, [SEAL.]

Major U. S. Army, Sup. L. Mines.

J. P. B. GRATIOT, [SEAL.]

ROBERT BURTON." [SEAL.]

Which being read and heard, the defendants interposed a general demurrer to the declaration; and upon the argument of the demurrer, the opinions of the judges were opposed upon the following point. "Whether the president of the United States had power, under the act of congress of the 3d of March 1807, to make the contract set forth in the declaration;" which point has been duly certified to this court. The act of congress referred to, is entitled, "an act making provision for the disposal of the public lands situate between the United States military tract, and the Connecticut reserve, and for other purposes." This act establishes a land-office, and makes provisions for the disposal of the lands of the United States referred to in the title of the act; and among other things, the fifth section declares as follows: "That the several lead-mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the president of the United States, shall be reserved for the future disposal of the United States. And any grant which may hereafter be made for a tract of land containing a lead-mine, which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null; and the president of the United States shall be and is hereby authorized to lease any lead-mine, which has been, or may hereafter be discovered in the Indiana territory, for a term not exceeding five years."

That the mines now in question lie within the territory referred to in the act of congress, and are the property of the United States is not denied. And the constitution of the United States (article 4, § 3) provides, "that congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property, belonging to the United States." The term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And congress has the same power over it as over any other property belonging to the

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United States ; and this power is vested in congress without limitation ; and has been considered the foundation upon which the territorial governments rest.¹ In the case of *McCulloch v. State of Maryland*, 4 Wheat. 422, the chief justice, in giving the opinion of the court, speaking of this article, and the powers of congress growing out of it, applies it to territorial *governments ; and says, all admit their constitutionality. And [*538 again, in the case of the *American Insurance Company v. Canter*, 1 Pet. 542, in speaking of the cession of Florida, under the treaty with Spain ; he says, that Florida, until she shall become a state, continues to be a territory of the United States government, by that clause in the constitution which empowers congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of congress over the lands belonging to the United States, the words "dispose of," cannot receive the construction contended for at the bar ; that they vest in congress the power only to sell, and not to lease such lands. The disposal must be left to the discretion of congress. And there can be no apprehension of any encroachments upon state rights, by the creation of a numerous tenantry within their borders ; as has been so strenuously urged in the argument.

The law of 1807, authorizing the leasing of the lead-mines, was passed before Illinois was organized as a state ; and she cannot now complain of any disposition or regulation of the lead-mines previously made by congress. She surely cannot claim a right to the public lands within her limits. It has been the policy of the government, at all times, in disposing of the public lands, to reserve the mines for the use of the United States. And their real value cannot be ascertained, without causing them to be explored and worked, under proper regulations. The authority given to the president to lease the lead-mines, is limited to a term not exceeding five years ; this limitation, however, is not to be construed as a prohibition to renew the leases, from time to time, if he shall think proper so to do. The authority is limited to a short period, so as not to interfere with the power of congress to make other disposition of the mines, should they think proper so to do.

Does, then, the contract upon which the present action is founded, fall within the authority given to the president to lease the lead-mines ? Or, in other words, is this contract a lease, within the meaning of the law ? In construing this contract, the bond, and what is called "the license for smelting," are to be taken as parts of the same instrument ; and purport to have been made with the defendants, with T. C. Legate, superintending the United States' lead-mines, acting under the direction of the secretary of war, who must be presumed to be acting under the authority of the president ; especially, as the permission given by the contract, in terms, is said to be by and with the appropriation of the president of the United States. This contract purports to be a license for smelting lead-ore ; and it is objected, that this is not a lease, within the meaning of the act of congress. But this objection is not well founded. It is a contract for one year, and of course, within

¹ This clause of the constitution only applies to territory within the chartered limits of some one of the states when they were British colonies ; it does not apply to territory acquired

by the present federal government, by treaty or conquest from a foreign nation. *Scott v. Sandford*, 19 How. 395.

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the time limited by the law, which gives to the president authority to lease for five years. Is it, then, a lease? The legal understanding of a lease for years is, a contract for the possession and profits of land, for a determinate period, with the recompense of rent. The contract in question is strictly *539] within this definition. The *business of smelting is a part of the operation of mining, although it may be a distinct branch from that of digging the ore; but the law ought not to be so construed as to require the whole operation to be embraced in the same contract. They are different operations, requiring different qualifications, and distinct regulations. This contract is for the possession of land. The work is to be performed at the United States' lead mines, and must, of course, be performed within the limits prescribed by law to be attached to such mines. And there is an express permission to use as much fuel as is necessary to carry on the smelting business, and to cultivate as much land as will suffice to furnish teams, &c., with provender; and there is an express reservation of the rent of six pounds of every hundred pounds of lead smelted, with special and particular stipulation for securing the same. It is not necessary that the rent should be in money. If received in kind, it is rent, in contemplation of law.

We are accordingly of opinion, that the question certified in the record must be answered in the affirmative.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Illinois, and on the point and question on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that "the president had power, under the act of the 3d of March 1807, to make the contract set forth in the declaration." Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court accordingly.

*540] *GEORGE HOLMES, Plaintiff in error, *v.* SILAS H. JENNISON, Governor of the State of Vermont, and JOHN STARKWEATHER Sheriff of the County of Washington, in the said State of Vermont, and their successors in office, Defendants in error. .

Extradition.

In the state of Vermont, George Holmes was confined under a warrant issued by the governor of that state, directing the sheriff of the county of Washington, to convey and deliver him "to William Brown, the agent of Canada, or to such person or persons as, by the laws of said province, may be authorized to receive the same, at some convenient place on the confines of this state and the said province of Lower Canada; to the end that he, the said George Holmes, may be thence conveyed to the said district of Quebec, and be there dealt with as to law and justice appertains."

The warrant stated, that "George Holmes was in the custody of the sheriff," by reason of a charge of felony, sustained by indictment, found by the grand jurors of the district of Quebec, in the province of Lower Canada; that "the said George Holmes, on the 31st day of January 1838, at the parish of St. Louis of Kamourasca, in said district, did feloniously kill and murder one Louis Paschal Achille Tache; and whereas, the said George Holmes not being a citizen of the state of Vermont, but a citizen of the said province of Lower Canada, and has come into

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this state from the said province of Canada, and the offence whereof he stands charged as aforesaid, having been committed within the jurisdiction of said province, it is fit and expedient that he, the said George, be made amenable to the laws of said province, for the offence aforesaid."

A writ of *habeas corpus* was, on the petition of George Holmes, issued by the supreme court of Vermont, and on the return thereto by the sheriff, stating the warrant of the governor to be the cause of his detention, he was remanded by the court; Holmes prosecuted a writ of error to the supreme court of the United States. The writ of error was dismissed, the court being equally divided.

ERROR to the Supreme Court of Judicature of the State of Vermont. On the 19th of July 1839, George Holmes presented a petition to the supreme court of the state of Vermont, then in session, setting forth that he was in the custody of John Starkweather, sheriff of the county of Washington, in the common jail of Montpelier, under a warrant bearing date the 16th of April 1839, issued by Silas H. Jennison, governor of Vermont; and that he was unlawfully imprisoned and restrained of his personal liberty. He prayed for a writ of *habeas corpus*, to be directed to the sheriff. The writ was issued, and the sheriff returned that he had the body of the petitioner before the court, and that he held him in custody under the following order from the governor of the state of Vermont:

"STATE OF VERMONT: To John Starkweather, Esquire, Sheriff of the County of Washington, greeting:

Whereas, George Holmes, late of Sorel, in the province of Lower Canada, is now detained in the common jail in said Washington county, and under your custody, by reason of a certain charge of *felony, sustained by indictment found by the grand jurors of the district of Quebec, in said province, to wit: That the said George Holmes, on the 31st day of January 1839, at the parish of St. Louis of Kamouraska, in said district, did feloniously kill and murder one Louis Paschal Achille Tache; and whereas, the said George Holmes, not being a citizen of the state of Vermont, or of any of the United States, but a citizen of the said province of Lower Canada, and has come into this state from the said province of Canada, and the offence, whereof he is charged as aforesaid, having been committed within the jurisdiction of said province, it is fit and expedient that he, the said George, be made amenable to the laws of said province, for the offence aforesaid: You are, therefore, required, that, as soon as may be after the 27th day of (instant) April, the body of the said George Holmes, now in your custody, you convey and deliver to William Brown, the agent of Canada, or to such person or persons as, by the laws of the said province, may be authorized to receive the same, at some convenient place on the confines of this state and the said province of Canada; to the end, that he, the said George Holmes, may be therein conveyed to the said district of Quebec, and be there dealt with as to law and justice appertains. Hereof fail not, but of your doings in the premises make due return. Given under my hand, at Shoreham, this 16th day of April 1839.

S. H. JENNISON, Governor of Vermont."

On the hearing of the *habeas corpus*, before the Supreme Court of Vermont, evidence was produced which showed that George Holmes was a native citizen of the United States, having been born in the state of New Hampshire.

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A correspondence between C. P. Van Ness, Esq., the governor of the state of Vermont, in the year 1825, with the executive of the United States, was also given in evidence. In March 1825, the governor of Vermont forwarded to Mr. Clay, the secretary of state of the United States, a communication addressed to him by "the acting governor of Canada," stating that two soldiers of a British regiment, who had committed a robbery on two officers of the regiment, were then in confinement in jail, in Burlington, Vermont, and asked that the offenders should be delivered up to a person to be authorized to receive them, to be brought to justice in the province of Canada. The governor of Vermont, in the letter to the secretary of state, expresses his readiness to attend to any directions the secretary of state of the United States might please to give on the subject. The reply of Mr. Clay, which was transmitted by Governor Van Ness to the acting governor of Canada, states: "I am instructed by the president to express his regret to your excellency, that the request of the acting governor of Canada cannot be complied with, under any authority now vested in the executive government of the United States; the stipulation between this and the *542] British government, for the mutual delivery of fugitives from justice, being no longer in force; and the renewal of it by treaty, being, at this time, a subject of negotiation between the two governments."

A motion was made for the discharge of the prisoner, upon the ground of the insufficiency of the cause alleged for his detention, as being at variance with the provisions of the constitution of the United States; and after a hearing of the case, the court rendered judgment against the application, and ordered the prisoner to be remanded. George Holmes prosecuted this writ of error.

The case was argued by *Van Ness*, for the plaintiff in error. No counsel appeared on the part of the defendants.

Van Ness, for the plaintiff in error.—The case in the record now before the court presents two general questions. First, has this court jurisdiction? And secondly, if it has, is the judgment complained of erroneous?

The question of jurisdiction depends essentially upon the provisions of the constitution of the United States, defining the powers of this court, and upon the 25th section of the judiciary act of 1789, prescribing the mode in which the judgments of state courts, in certain cases, can be here re-examined. But before entering upon this field, it may be proper briefly to advert to the principles of the common law, as it regards the prosecution of writs of error. It appears never to have been judicially settled in England, whether this writ would lie where a judgment had been rendered on the return to a *habeas corpus*; though the point, in one or two instances, has been incidentally alluded to, while in another, it was directly agitated, but without any decisive result. In the case of *Wagoner*, called the *Case of the City of London*, reported in 8 Co. 253, there was an objection made to the return upon a *habeas corpus*, that it consisted too much in recital, instead of being more direct and certain; and the court answered, that it "was not a demurrer in law, but a return on a writ of privilege, upon which no issue could be taken or demurrer joined; neither upon the award would any writ of error lie, the return being to inform the court of the truth of the matter in which such precise certainty is not required as in pleading." In the case

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of the *King v. Dean and Chapter of Trinity Chapel, in Dublin*, reported in 8 Mod. 28, and in 1 Str. 536, a writ of error was brought to the king's bench, in England, to reverse a judgment of the king's bench, in Ireland, awarding a peremptory *mandamus*, and it was decided, that error would not lie. In the first-mentioned report of this case, the court is represented as saying: "It is against the nature of a writ of error, to lie on any judgment but in causes where an issue can be joined and tried, or where judgment may be had upon a demurrer and joinder in demurrer, and therefore, it would not lie *on a judgment for a *procedendo*, nor on the return of a *habeas corpus*." By the report of Strange, which is much more full, and doubtless, more correct, it appears, that on the first argument of the case, the judges doubted as to whether the writ of error could be brought, some of them leaning one way, and some the other way. But after a second argument, they agreed, that the writ could not be sustained. Nothing, however, is said about a writ of error on a *habeas corpus*, except that one of the judges inferred from the form in which the judgment was entered in the case of the *Aylesbury men* (of which I shall presently take notice), that that case was not thought to be one in which a writ of error could be brought. And upon looking into the reasons assigned for the decision, it will be seen, that the principal one was the omission of the words, "*ideo consideratum est*," in the entry of the judgment. [*543]

Here, let it be observed, that in neither of the two cases referred to was there a question, whether a writ of error would lie in the case of a *habeas corpus*; and therefore, that whatever may have been said by the court in either of them, upon this point, was foreign to the subject before them, and cannot be entitled to the weight of authority. And it should be particularly noticed, that the principal reason upon which the last-mentioned case was finally decided, was the omission of the words, "*ideo consideratum est*," in the entry of the judgment; thus placing the question, whether the decision of the court constituted a regular judgment upon the particular words made use of in entering such decision on the record, instead of determining that point from the nature and effect of the decision so given.

But there remains the case of the *Aylesbury Men* (*Regina v. Paty*), in which the question which we are now discussing, directly arose. This case occurred in the first years of the reign of Queen Anne, and is reported in 2 Salk. 503, and in 2 Ld. Raym. 1105, and also in Holt 526. There was a commitment by order of the house of commons, of certain persons, for an alleged contempt, in having commenced an action against the constables of Aylesbury, for refusing to take their votes at an election for members of parliament. The prisoners were brought before the court of king's bench, by a writ of *habeas corpus*, and three of the four judges held, that the commitment was legal; but HOLT, Chief Justice, declared the contrary. A writ of error to the house of lords upon this judgment, having been applied for, the house of commons insisted, that none ought to be granted, while the house of lords took the opposite side. The latter condemned the course pursued by the commons, and requested of the Queen, "that no consideration whatever should prevail with her majesty to suffer an obstruction to the known course of justice; but that she would be pleased to give effectual orders for the immediate issuing of the writ of error." And in refer-

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ring to the several objections made by the commons, they said : "As to the second thing they (the commons) have taken upon them to *assert, *544] that no writ of error lies in the case ; we affirm to your majesty, with great assurance, that the house of commons have no right or pretence to determine whether that be so or not. The right to judge when a writ of error is properly brought, is by law intrusted to that court to which the writ of error is returnable. And therefore, we shall not at present say anything to your majesty, in an extra-judicial way, and before the proper time, as to the point, whether a writ of error brought upon a judgment for remanding prisoners upon a *habeas corpus* can be maintained." Now, although the house of lords did not in terms declare that the writ, if brought, would be sustained by them, yet it would certainly be unreasonable to suppose, that they would have pressed the subject in the manner they did, had they been of the contrary opinion. And as this case occurred nearly one hundred years after that of the *City of London*, it follows most clearly, that what had been loosely said in the latter, had never grown into authority, nor had any effect towards settling the principle. The question, therefore, remains an open and unsettled one, in England, to this day.

In Coke's Com. on Littleton, 288 *b*, it is laid down, that "a writ of error lieth, when a man is aggrieved by an error in the foundation, proceedings, judgment or execution." And again, that "without a judgment, or an award in the nature of a judgment, no writ of error doth lie." Now, what is a judgment, but the decision of the court upon the case before it ? And is not the decision upon the return to a *habeas corpus*, determining whether the imprisonment of a person is lawful or unlawful, a judgment in the case ; or, at least, an award in the nature of a judgment ? There is a case regularly brought before the court, and the merits of the question which it was designed to try are examined and determined. If this determination does not constitute a judgment, I am at a loss to understand what does. And moreover, in order to determine this, is it reasonable or proper, that we should shut our eyes to the nature and character of the act performed by the court ; and look merely at the particular set of words, that may happen to be used in recording such act ? It should here be noted, that error lies in England, to reverse an outlawry ; that it lies upon a statute-merchant ; and also upon a fine ; in neither of which last two cases, at least, can it be said, that there is any judgment of a court.

In the state of New York, this subject was very fully and ably discussed in the case of *Yates v. People*, reported in 6 Johns. 337 ; and it was there decided by the court of errors, the highest judicial tribunal in the state, that a writ of error would lie in the case of a *habeas corpus*. It is true, that there was a respectable minority in the court, dissenting from the decision, but it can scarcely be denied, that the weight of the argument was on the side of the majority. And I beg, particularly, to refer the court to the opinion delivered by that great man, De Witt Clinton, who, though not a technical, *545] nor even a practising lawyer, exposed in a *masterly and unanswerable manner, the weakness and absurdity of the grounds urged, why a writ of error should not be considered a legal and appropriate remedy in a case of this kind.

Upon the whole, therefore, it appears to me, that the jurisdiction of this

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court in the present case, so far as it concerns the point whether a writ of error will lie in the case of a *habeas corpus*, is sustainable, even upon the principles of the common law. But we will now turn to the constitution and laws of the United States; upon which, after all, as I have already said, the question essentially rests. The constitution provides, that in all cases arising under the same, the laws of the United States, and the treaties made under their authority, this court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as congress shall make. By the 25th section of the judiciary act of 1789, a final judgment or decree in any suit, in the highest court of law or equity in which a decision could be had, of a state, may be re-examined and reversed or affirmed in this court, upon a writ of error, where is drawn in question, upon other subjects, the validity of an authority exercised under any state, on the ground of such authority being repugnant to the constitution or laws of the United States, and the decision of the state court is in favor of the validity of such authority.

The principal question which the record in this case presents is, whether the authority exercised by the governor of Vermont, under or on behalf of the state, in issuing the order for the arrest of the plaintiff in error, and his transportation to a foreign country, was in violation of, or repugnant to, the constitution of the United States. And it has been fully settled by this court, that it need not, in terms, be stated, that the constitution or an act of congress was drawn in question, in order to give the court jurisdiction on error from a state court; but that it is sufficient, if the record shows that some one of the requisite questions was necessarily involved in the case. I will not, therefore, spend further time to prove that the subject-matter of this cause may come here; but will proceed with the examination, as to whether it has been brought here in the manner prescribed by the act of congress.

The substance of what is required is, that there should be a question, of which, by the constitution, this court has appellate jurisdiction; the manner of bringing that question here being but matter of form. And herein consists the difference between the principles which are to govern the decision of this case, and those which are applicable to writs of error in England. There, the right to bring error appears to depend upon the form of the proceedings which are sought to be re-examined, without regard to the merits of the controversy; while here, it depends upon the principles involved in the case, without regard to the form of the proceedings. It is but fair to suppose, that it was the intention of congress, in framing the provisions of the judiciary act of 1789, which have been *already stated, to carry into execution the grant of jurisdiction contained in the constitution; [*546 and in that light, the act should be liberally construed. But so far as it may be supposed, that the object was to make exceptions to the grant, the construction ought to be a strict one. And here let me make the passing remark, that although, in my judgment, some erroneous ideas have been entertained as respects the power of congress to make exceptions, yet that I do not deem it necessary to my present purpose, to enter upon that question.

I return to the point, the constitution, as we have seen, embraces in the jurisdiction, all cases arising under the same, or under the laws and treaties

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of the United States ; while the act of congress provides for a writ of error from the judgment of a state court, in any suit in which certain questions of the nature of those mentioned in the constitution, and including the one presented by the record before the court, shall arise. Can there be a reasonable doubt, that the main object of the law was, to provide for bringing up the questions specified, without reference to the particular form of the proceedings in which they might occur? Is it not plain, that the terms "any suit," were intended to be used in a sense co-extensive with "all cases?" And, indeed, I feel persuaded, that I might safely rest the question upon the meaning of the term "suit," by itself considered. It is defined, to be "the lawful demand of one's right;" and what broader expression can be necessary to include the writ of *habeas corpus*, which is brought to recover one's personal liberty, the highest and most valuable of all rights?

But finally, I view this question to have been settled (at least in effect) by this court. In the case of the *Columbian Insurance Company v. Wheel-right*, 7 Wheat. 534, it was decided, that error would lie upon the award of a peremptory *mandamus*. Error was also sustained in a similar case, in favor of Mr. Kendall, the postmaster-general. 12 Pet. 524. And in the case of *Weston v. City Council of Charleston*, 2 Pet. 450, it was determined, that this writ might be brought upon a denial to grant a prohibition. In the last-mentioned case, the following language, with reference to the word "suit," was used by Chief Justice MARSHALL, in delivering the opinion of the court: "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

I wish to bring back to the notice of the court, that it has been settled in England, by the house of lords, that neither in the case of a *mandamus*, nor of a prohibition, can a writ of error be sustained. As to the former, it was decided in the case already cited, of the *King v. Dean and Chapter of Trinity Chapel*, which was *carried up to the house of lords. And *547] with regard to the latter, it was settled in the case of the *Bishop of St. David's v. Lucy*, 1 Salk. 154; 1 Ld. Raym. 545. If, then, this court has exercised jurisdiction in both of those cases, contrary to the decisions of the highest courts in England, why should not the jurisdiction be sustained in the one now before the court; when it has never been determined in England, that a writ of error could not be brought to reverse a judgment rendered on the return to a *habeas corpus*? Surely, it will not be said, that property is more worthy of the protection of this court, than the personal liberty of the citizen. Nor can it be pretended, that a *mandamus* or a prohibition is esteemed a higher remedy than the writ of *habeas corpus*, the privilege of which was considered of so sacred a character, and so essential to the personal security of the people, that the constitution has provided against any suspension of it, even by congress, except in cases of rebellion or invasion.

But I will leave this part of the case, in the full persuasion that, even without any other argument or authority, the determination of this court, and the reasons upon which it was founded in the case of *Weston v. City*

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Council of Charleston, is absolutely decisive in favor of the jurisdiction which I have endeavored to maintain.

I come now to the main question in the case, which is, whether the judgment of the state court is erroneous or not. I am not able to present to this court the reasons upon which the three judges of the court below, who concurred in the decision, founded their judgment; since they have never appeared willing to assign any, though repeatedly called upon to do so.

The first point, upon this part of the case, for which I contend, is, that the surrender of persons charged with the commission of crimes in foreign countries, is a mere matter of comity between nations, and not of obligation; but that whether it be the one or the other, the subject is wholly of a national character, and the power over it conferred exclusively upon the government of the Union. Of the more early writers who have treated upon the subject, Grotius, Burlamaqui and Vattel assert, that a positive obligation exists to make the surrender; while Puffendorf, Martens and Lord Coke deny the existence of such obligation, and hold, that surrenders are only made upon the ground of national comity, or by virtue of treaty stipulations. The authors and legal characters, who have more recently treated of the matter, in this as well as in other countries, generally, if not all of them, maintain the latter position.

There are two adjudged cases in this country, which deserve to be noticed. The one is a decision of Chancellor KENT, of New York, and is to be found in 4 Johns. Ch. 106; and the other, of Chief Justice TILGHMAN, of Pennsylvania, reported in 10 Serg. & Rawle 125. Chancellor KENT insists, that, by the laws of nations, there is an absolute and positive national obligation to surrender fugitives from justice, on proper demand being made. He undertakes to maintain, that the article in the treaty of 1794, between the United States and Great Britain, providing for [548 the mutual surrender of persons charged with murder and forgery, created no new obligation; and he even supposes it to have operated, during its existence, as a restriction, so far as it related to the crimes in regard to which surrenders were to be made. Chief Justice TILGHMAN maintains precisely the opposite ground; and it appears to me, that no impartial man can read his opinion, without acknowledging the superiority of his reasoning, and becoming convinced of the correctness of his conclusions. There is no English authority that maintains the doctrine of obligation. In two of the cases cited by Chancellor KENT, the persons accused were sent to Ireland for trial, and in another, to Calcutta; but in all three of them, it was upon the ground, that this was allowable by the provisions of the *habeas corpus* act of Charles II., since the places to which the prisoners were sent were under the dominion of the king of England. What was done with the man who was suspected of a murder in Portugal, is left in doubt; the whole report of the case being as follows: "On a *habeas corpus*, it appeared, that the defendant was committed to Newgate, on suspicion of murder in Portugal, which (by Mr. Attorney) being a fact out of the king's dominions, is not triable by commission, upon 35 of Henry VIII., c. 3, § 1, but by a constable and marshal; and the court refused to bail him." It certainly does not appear, that he was to be sent out of the country. The remark of Judge HEATH, in the case of *Meer v. Kay*, 4 Taunt. 34, although foreign to the question before the court, so far from operating

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against us, clearly shows that he did not consider the surrender of criminals as a matter of obligation. He expressly put it upon the ground of the "comity of nations," that it had been held that the crew of a Dutch ship, which had run away with the vessel, might be sent back.

But the decisions and practice of our own government ought to be deemed to be conclusive upon this subject. Ever since the organization of the general government, it has been held, that we were under no obligation to surrender persons who had sought an asylum here, though charged with the commission of crimes, previous to their change of country. In the year 1791, the governor of South Carolina made a request that the president of the United States should demand of the governor of Florida, certain persons who had committed crimes in South Carolina, and fled to Florida. Mr. Jefferson, the secretary of state, in his report to President Washington, says : "England has no convention with any nation for the surrender of fugitives from justice, and their laws have given no power to their executive to surrender fugitives of any description, they are accordingly constantly refused ; and hence, England has been the asylum of the Paolis, the la Mottes, the Calonnis ; in short, of the most atrocious offenders, as well as of the most innocent victims, who have been able to get there. The laws of the United States, like those of England, receive every fugitive ; and no authority has *549] been given to our executives to deliver them up. If, then, the United States could not deliver up to General Quesnada (Governor of Florida), a fugitive from the laws of his country, we cannot claim as a right the delivery of fugitives from us. And it is worthy of consideration, whether the demand proposed to be made in Governor Pinkney's letter, should it be complied with the other party, might not commit us disagreeably, and perhaps dishonorably ; for I do not think that we can take for granted, that the legislature of the United States will establish a convention for the mutual delivery of fugitives ; and without a reasonable certainty that they will, I think we ought not to give Governor Quesnada any ground to expect that in a similar case we would redeliver fugitives from his government."

In the year 1793, Mr. Jefferson answered an application of Mr. Genet, the French minister, in the following terms : "The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming within their pale, is received by them as an innocent man, and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye is sensibly felt here, as in other countries ; but until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be to become their accomplices. The former is viewed, therefore, as the lesser evil. When the consular convention with France was under consideration, this subject was attended to ; but we could agree to go no further than is done in the ninth article of that instrument, where we agree mutually to deliver up captains, officers, marines, sailors and all other persons, being part of the crews of vessels. Unless, therefore, the persons demanded be part of the crew of some vessel of the French nation, no person in this country is authorized to deliver them up ; but on the contrary, they are under the protection of the laws."

Mr. Monroe, as secretary of state under President Madison, in his instructions to our commissioners at Ghent, said : "Offenders, even con-

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spirators, cannot be pursued by one power into the territory of another, nor are they delivered up by the latter, except in compliance with treaties, or by favor." And as our government has, in all cases of applications from foreign powers, refused to surrender, upon the same ground, I would ask whether these decisions, and this practice, ought not to be conclusive upon all the authorities of our national and state governments? Are we still to search among the general and vague remarks of the old writers upon the laws of nations, to ascertain what are our obligations in this respect; when they have been so fully settled by our own government? This, indeed, would be most extraordinary.

But I have said, that whether a matter of obligation, or of comity, the subject appertains exclusively to the national government. It is now well settled and understood, that there are three ways in which the states have been deprived of power by the constitution. First, where there is a grant of power to the national government, exclusive in its terms. Secondly, where, after a grant *to that government, there is a prohibition upon the states in relation to the same object. And thirdly, [*550 where the exercise by the states of an authority conferred upon the national government would be repugnant and incompatible.

Before proceeding to inquire whether the power to act upon the subject of surrendering fugitives from foreign countries, is included in any grant of the character described under the first of these heads; or whether, in any prohibition referred to, under the second; let us see whether it does not become exclusive in the national government, simply upon the principle stated under the last head.

From the very nature and organization of the general or national government, it is vested with the sole jurisdiction over all matters of a national character, and of external concern. The states, by the adoption of the existing constitution, have become divested of all their national attributes, except such as relate purely to their internal concerns. They are not known to foreign governments as states, nor can they properly be distinguished by them from the mass of this nation. Every question, then, which can arise, and to which a foreign power is a party, or in relation to which any correspondence with such power becomes necessary, belongs to the government of the nation. In short, as to all such matters, we are one and indivisible; precisely the same as if we had no separate states, nor any authorities in the country except those of the Union.

Can it be denied, that the demanding and surrendering of fugitives, as between different countries, is a matter of national and of external concern? The demand is made by the government of one country, upon that of another country, and the surrender made in compliance with such demand, is most clearly an act performed at the instance, and for the benefit, of a foreign power. And if this is a mere matter of national comity, and not of obligation, as I believe I have satisfactorily shown, the interference of the states would be, if possible, still more improper and incompatible. Some states might practise upon one principle, and some upon another; which might lead to an entire want of uniformity in their proceedings, even as to the same foreign power. The views and plans, too, of the national government in relation to the subject, would always be subject to be frustrated

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and defeated by the action of the states ; the consequences of all which could scarcely fail to be highly mischievous, if not actually dangerous.

Some of the writers who assert the existence of the obligation referred to, go so far as to say, that a refusal to surrender a fugitive may be cause of war. But has a state the power in this way to involve the whole nation in a foreign war? Or let us suppose, that one of our states should demand a criminal from a foreign government, and the latter refuse a compliance, would the state in that case have the right to declare war? On whose behalf, would she make such declaration? On her own, or on that of the national government? The moment we admit, that a state can act upon a matter of this kind, we are unavoidably led into these difficulties.

*551] *For with the duty or obligation to surrender, is coupled the power to demand, and to this power follows the right to enforce such demand. Who, then, can, for an instant, yield his assent to a proposition so absurd and so dangerous?

From what I have already said, it appears to me, there can be no room for an argument, that the states may severally act upon the subject, until the national government shall have acted, or until the two powers come in competition with each other. If this were to be the rule, then, the United States, by entering into regulations with some foreign nations, would deprive the states of their powers with regard to such nations, while they would remain as to other countries, and might be exercised upon entire distinct principles from those adopted by such regulations. Some states, too, as already stated, might decide one way, and some another way ; so that we might have between the national and the state governments, several different and contradictory practices in relation to the same matter. It follows, therefore, that this is a power which, independently of its being purely of a national and external character, is not susceptible of being divided up among the national and state governments, or of being concurrently exercised between them.

But I apprehend, that the states are prohibited by the constitution from acting upon this subject. The powers of war and peace, and of making treaties, are conferred upon the general government ; and at the same time, expressly prohibited to the states. Every incident, therefore, which follows the grant, is equally included in the prohibition ; and thus is the whole subject of the foreign relations of the country placed under the exclusive jurisdiction of the government of the Union. That the matter now in question is necessarily one of foreign intercourse, and may even call into action the war-power ; or, at any rate, that it is peculiarly proper for the exercise of the treaty-making power ; appears so clear, that I will add nothing upon that point to what has already been said.

If it should be said, that although the United States have the power to regulate this subject by treaty, yet that until they do so, the states, by making surrenders, do not violate the constitution of the United States ; the answer, in my judgment, is easy and plain. If the United States can make a treaty for the surrender of fugitives, generally, they can make one for the surrender of a particular person ; and the power to agree to make the surrender, implies the power to refuse it. Well, suppose, they should refuse to enter into such a treaty, in a particular case, from a conviction that the person in question ought not to be surrendered, and a state should under-

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take to deliver up the same person, upon the ground, that the general government had made no treaty touching the case; would not this be a violation of the constitution? And would it not be equally so, where the arrangement should be refused by our government, for some special reason arising out of our intercourse with the foreign power applying for it? The general government alone understands the state of our relations with each foreign government, *and therefore, can alone know how to act, in a case of this kind, towards each one of them. And it would be extraordinary, that there should be no way to prevent the states from interfering and disconcerting the action and intentions of the general government, in a matter so essentially connected with our foreign intercourse, except for the United States actually to make a treaty on the subject. But there are even some opinions, that a fugitive from justice cannot be delivered up to a foreign government, in any other way than by treaty. Upon this principle, it would certainly seem, that the subject, as a direct and necessary consequence, belonged, by the constitution, exclusively to the treaty-making power. For it would be a singular supposition, that the states are prohibited from making treaties with foreign powers, and yet not prohibited from doing those acts in relation to such powers, which can only be performed through the intervention of treaties. [*552]

And what measure of action by the general government, according to the doctrine against which I am contending, would bring the constitution into actual operation upon the states? Would a treaty of the United States with some foreign power, for the mutual surrender of persons charged with murder, leave the states at liberty to make surrenders to the same power for forgery, or any other crime less than murder? I hardly think this will be contended for by any one; and yet the case, in my judgment, would stand upon the same ground, as when the United States refused to make a treaty to deliver up for any offence whatever. If the mere negative action of the general government, in part, should preclude the states to the same extent, why should not the negative action in whole, have the effect to exclude them altogether? It may, perhaps, be said, that the determination of the general government to surrender for one crime, was acting upon the subject, and therefore, precluded the states from surrendering for any crime; as well those left untouched, as the one provided for. But if the general government, from motives of policy, and for reasons deemed sound, should determine to make no surrenders at all, to some particular power, why should not this determination have the same effect as the other? Mr. Jefferson, in his letter to Mr. Genet, said: "When the consular convention with France was under consideration, this subject was attended to; but we could agree to go no further than is done in the ninth article of that instrument, where we agree mutually to deliver captains, officers, marines and sailors." Can it, with reason, be contended, that after that determination, it was in the power of the individual states to deliver up to the French government fugitives charged with offences against its laws?

It will be further seen, that the states are prohibited even from entering, without the consent of congress, into "any agreement or compact with another state, or with a foreign power." Now, can it with any propriety be said, that a state can act upon this subject, and at the instance of a foreign government, when, at the same time, she is prohibited from entering into

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any agreement or compact *with such government in relation to the same? Certainly, the power to act implies the power to regulate the manner of action. If one party has a duty or obligation to perform towards another, the two ought to have a right to come to some agreement or understanding as to the way or manner of performing such duty or obligation. Is not this so plain, that it cannot be misunderstood by a person of the most ordinary capacity? And, indeed, should not the very order of surrender, made at the instance of a foreign power, be deemed to constitute an agreement to make such surrender? What else can you call it, where one party asks the performance of an act, and the party applied to consents, but an agreement to do the thing required?

If, then, the subject in question does not belong exclusively to the national government, it does not belong to it at all. For, if so vested, it is because it appertains to the foreign intercourse of the country; and is necessarily exclusive. But if not so vested, then it is among the reserved powers of the states, and remains exclusively with them. If it is a reserved power of the states, it will at once be seen, that all that has been done in relation to it, by the national government, from the adoption of the constitution to this time, has been void and unconstitutional. The 27th article in Jay's treaty was void. The surrender, under it, of Robins, *alias* Nash, was, of course, unauthorized. And all the negotiations and correspondence which have taken place upon the subject, during this whole time, have been without any authority. Yet nothing of this kind appears ever to have been contended for, or even suggested. The case of Robins was largely and warmly discussed in the house of representatives of the United States, at the time of his surrender, or soon afterwards; and among all the objections raised in regard to it, no question appears to have been made of the authority of the national government over the subject, nor a suggestion that the states had any concern with it.

Again, it could only be upon the ground of connecting the subject with the right of the states to regulate their internal police, that it could be supposed to be included in their reserved powers. But none of the writers on public law have treated this question as one at all connected with the internal police of a country, or with any internal power whatever. On the contrary, it has been uniformly ranked among the questions of external and foreign concern; and is spoken of only when treating of the relations between different countries. And in the case of the *City of New York v. Miln*, 11 Pet. 105, the police powers of the states were fully examined and defined by this court; and I think it will not be denied, that they were extended to their utmost limits. But at the same time, it will be perceived, that the subject now under discussion was not embraced by any of the principles declared to be applicable to those powers. The state law in that case had its operation, and its whole operation, within the territory and jurisdiction of New York. It neither led, nor could lead, to an intercourse or correspondence with any foreign power whatever. And it had, moreover, no reference

*554] *to the commission of crimes, within or without the state, nor to the arrest of criminals of any description.

It is true, that the legislature of the state of New York, several years ago, enacted a law authorizing the governor of the state, in his discretion, to surrender fugitives from foreign countries. But public opinion has lately

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manifested itself strongly against the validity of the law ; and the governor, during the last year, refused to act under it, upon the express ground, that the national government had exclusive jurisdiction over the subject, and consequently, that the act of the legislature was unconstitutional and void.

But secondly, if it should be admitted that a state, by some police regulations within her power to make, could effect the expulsion from her jurisdiction of a person charged with a crime in another country ; still the act of the governor of Vermont, in the present case, was not of that character, but was a direct act of foreign intercourse, and therefore, illegal and void. The order for the arrest of the plaintiff in error was not founded upon any law of the legislature of Vermont for the regulation of her internal police ; nor, in fact, upon any authority whatever proceeding from the state. On the contrary, it is manifest from the order itself, and has always been admitted, that the governor proceeded upon the ground of a supposed obligation on the part of the state, arising under the laws of nations, to surrender fugitives from justice, on the application of foreign governments ; and a belief that he had a right, as the executive of the state, to fulfil such obligations, without any authority for the purpose, derived from the constitution or legislative acts of the state. But if any further proof were wanting, that the governor of Vermont was not acting, nor authorized to act, merely by virtue of his office, in the execution of any internal police regulation, it would be sufficient to point to the article in the constitution of that state, which declares, that "the people of this state, by their legal representatives, have the sole, inherent and exclusive right of governing and regulating the internal police of the same."

Neither has there been any practice or usage of the state, upon which the act in question can be attempted to be justified. Not a single person has ever been surrendered on the part of the state ; and it appears by the record, that in the year 1825, there was a positive refusal to give up two men who were demanded, as thieves, by the governor of Canada, and that the decision of the executive of Vermont was approved by the president of the United States. And here I beg the court to understand, that this case is not referred to, so far as it respects the decision of the then governor of Vermont, as an authority in point of law, but merely as one fact, among others, in order to exclude any pretence of an authority from usage for the proceeding in this case. And equally certain is it, that so far as it regards the surrender of American citizens, there could be no reciprocity on the part of Canada ; since, by the laws of that province, no subject of the realm can be sent prisoner out of the country. It was upon this ground, *that Lord Aylmer, the governor of Canada, in the year 1833, refused to surrender, on the application of the governor of New York, four men who had come over the line, and barbarously murdered a young woman in the town of Champlain. [*555

We have now arrived at the third and last point ; which is, that admitting a state to possess the right to act upon the subject of surrendering to foreign governments, fugitives from justice, yet that the sovereign power of the state must be brought into action, and the surrenders made under a regular law or proceeding of such power ; and that as the act now complained of was without any such authority, it was a violation of the provision

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in the constitution of the United States which declares, that "no person shall be deprived of life, liberty or property, without due process of law."

But here arises the question, whether this provision in the constitution is applicable to the states ; or, in other words, whether it constitutes a protection against the unlawful exercise of state power. I am aware, that it has been decided by this court, in the case of *Barron v. City of Baltimore*, 7 Pet. 243, that the amendments to the constitution of the United States, commonly called the bill of rights, were simply limitations of the powers of the general government, and had no effect upon the state governments. But as the decision is a recent one, and stands alone, I trust the court will attend to me, while I submit a few remarks upon a question so important and interesting.

Let me begin, by observing, that the rule of construction which can generally be resorted to, in order to determine the sense of any provision in the original constitution, cannot be applied to the articles of amendment. The constitution itself was one connected work, and was the result (if I may be allowed the expression) of a concentration of mind ; and in deciding upon one part of it, reference may be had to other parts, and the whole so construed as consistently to stand together. But the case is very different as it regards the amendments ; these have little or no connection with each other, varying both in their character and in their terms, and were originally proposed from different quarters, and with different objects. Each article, therefore, if not each clause, should be construed simply according to its own nature, and the terms in which it may be expressed.

With the utmost deference, I beg leave to observe, that in my humble judgment, an error was committed by the court, in the case referred to, in supposing all the articles of amendment to be in the nature of limitations of governmental power, or to have been so intended, at the time of their adoption. When we speak of a limitation of power, we have naturally in view some power which, without such limitation, might be lawfully exercised ; and of this character are the prohibitions in the original constitution, whether relating to the general government, or to the states. That some of the amendments are of the same character is unquestionably true. But there are others which are not so ; among which is the one containing *556] the clause declaring that "no person shall be deprived of life, liberty or property, without due process of law." These latter cannot be considered as limitations of power, but are to be understood as declarations of rights—of absolute rights, inherent in the people, and of which no power can legally deprive them.

The right of personal liberty has existed ever since the first creation of man, and is incident to his nature. It has been recognised from the earliest organization of society, and the first institution of civil government, until the present time. And for the plain reason, that this sacred right is beyond the reach of all legitimate power, it cannot properly be the subject of a limitation to the action of a regular government. Whether the declaration of this right, as well as of others, was made a part of the constitution of the United States, with a view, principally, of guarding it from violations by the general government, it is not material to inquire. We find it there, and the only question now is, as to the extent of its operation.

That the clause in question (and indeed the whole article in which it

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appears) embraces every person within the limits and jurisdiction of the whole Union, will not be denied. All that remains to be determined is, whether it is to be construed as leaving the states free to encroach upon the right which it declares every one shall enjoy ; or whether it is to be understood as recognising and adopting the principle that no power from any quarter can do so. In other words, whether the clause was inserted because it was deemed more proper for the states than for the general government to deprive a person of his life or liberty without law ; or, whether, to promulgate a general command against the violation of a right possessed by a title above all legitimate governmental power.

If it should be supposed, that in forming the constitution, no protection was wanted from the general government against the illegal exercise of state power, the answer is, that this, though generally true, is by no means universally so. There are several restrictions upon the states, in the constitution, for the benefit and security of the people ; and that, too, where the same powers are prohibited to the general government. One, for example, is, that no state shall pass *ex post facto* laws. And this is, for the reason, that no person ought to be punished by any government, for an act made criminal after the fact. Yet, surely, this principle is not more worthy of being guarded by the general government, than that a person shall not be twice punished for the same offence ; or that he shall not be deprived of his life or liberty, except by due course of law. But we find that the United States stand pledged in the constitution to guaranty to every state in the Union a republican form of government, and to protect each of them against domestic violence ; thus becoming directly and deeply interested that state power shall not be unlawfully or improperly exercised. It may, with truth, be affirmed, that most of the amendments to the constitution contain principles which lie at the very foundation of civil liberty, and are most intimately connected with the dearest *rights of the people. Principles [*557 which should be cherished and enforced by a just and parental government, to the utmost extents of its authority : principles which, in reality, like those proclaimed from the burning mount, deserve to be diligently taught to our children, and to be written upon the posts of the houses, and upon the gates.

It is true, that most of the states have incorporated into their constitutions the same principles ; though several of those instruments do not contain the important provision relied upon in this case. But this furnishes no argument against allowing them the force in the constitution of the United States for which I contend. Some of the state constitutions also contain the prohibition against passing *ex post facto* laws ; but does this weaken the authority of the same restriction upon the states in the general constitution ? And is it not, moreover, very proper, that the state constitutions should themselves embrace all the provisions necessary to a good government, whether they are needed for the present, or not ; since it cannot be foreseen, what further amendments or alterations may take place in the constitution of the United States.

But the distinction which I have endeavored to establish between the limitations of power and the declarations of rights, is adopted in the clearest manner in the constitution itself. The ninth article of the amendments declares, that "the enumeration in the constitution of certain rights, shall

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not be construed to deny or disparage others retained by the people." And the tenth article provides, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." Here we see, that the framers of these amendments had no idea of confounding the limitations of power, and the declarations of rights; but treated each as distinct from the other. If the amendments had treated only of the former, certainly, the reservation, both to the states and to the people, in the tenth article, would have answered every purpose. But the ninth article was deemed necessary, as it regarded the rights declared to exist, in order to prevent the people from being deprived of others by implication, that might not be included in the enumeration. It appears clear to my mind, then, that the provision in the constitution to which I have referred, instead of limiting the powers of the general government, directly calls into action those powers, for the protection of the citizen. That it forms a part of the supreme law of the land by which all the authorities of the states, as well as those of the Union, are bound. And that the establishment of the contrary doctrine would essentially weaken the security of the people; since it would leave without the protection of the paramount and superintending power of the Union, the great and fundamental right of personal liberty.

The question recurs, whether the plaintiff in error was arrested and is held, "without due process of law;" and thus in violation of the constitution of the United States. I have already said, with *regard to this *558] part of the case, that the sovereign power of the state of Vermont alone could authorize the surrender. I beg now to add, that I deem this position to be maintainable, whether it depends upon comity or upon obligation; though, perhaps, its defence might be thought most complete upon the first ground. If there is nothing upon the subject, beyond comity, then it rests entirely in the discretion of the state, as to the cases in which she will make surrenders, as well as to the conditions upon which they shall take place; and, indeed, whether she will make surrenders at all. How, then, but through the sovereign power of the state, can a discretion like this be regulated or exercised? And has it not always been with us a fundamental doctrine, that discretion in rulers, although the law of tyrants, is the scourge of a free people? In a despotie form of government, the sovereign power is the will of the monarch, who can act, in every instance, as may suit his pleasure. But can the governor of one of our states, of his own mere will, regulate and act upon this comity? Can he, without any authority from the constitution, or the legislative power of his state, issue an order for the arrest and delivery to a foreign government of any person whatever? If he can do this, then is the liberty of the citizen wholly at his arbitrary disposal. Does not the bare statement, however, of this point, carry along with it an argument, so unanswerable, that nothing further need be said upon it?

But it is a fact, that the only ground upon which the order for the surrender in this case has ever been attempted to be justified, was that there existed, by the laws of nations, a positive obligation on the part of the state of Vermont, to make surrenders in like cases; and that the governor of the state, by virtue of his office, had the power to carry into execution that obligation. Let us see, whether this doctrine will stand the test of reason.

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The laws of nations have no force over the people, individually, in any country, but only regulate the conduct of nations, as such, towards each other. If any duties or obligations are created by those laws, as between one country and another, each of these owes duties or obligations in her collective capacity, and can only perform them as its own sovereign authority may direct or permit. In an absolute government, as already stated, the sovereignty centres in the monarch, and everything is directed by him, according to his own arbitrary will. But in a republic, the sovereign power resides in the people, or is lodged where they have placed it; and the proceedings must always be in conformity with the principles of the government. It follows, therefore, that when it becomes necessary, in the performance of national duty or obligation towards a foreign power, to interfere with individuals, it can be done only through laws emanating from the sovereign authority of the state where they reside, or happen to be. For as the obedience of individuals is due only to those laws, so are they, at the same time, under their protection, and can only be reached through them. The statement of a *plain and familiar case will be sufficient to exemplify this proposition. Our government deemed the country to be under an obligation, by the laws of nations, to observe neutrality in the late Canadian revolt, and to prevent our citizens from taking part in the contest; but did it attempt, in the performance of this duty, to order personal arrests, or to meddle with the liberty of the people, without laws of congress passed expressly for the purpose? Certainly not!

The plaintiff in error, at the time of his arrest, was under the protection of the laws of the state of Vermont. In the constitution of that state, it is declared, that "no person can be justly deprived of his liberty, except by the laws of the land or the judgment of his peers;" and by an existing act of the legislature of the state, it is provided, that "no person's body shall be restrained or imprisoned, unless by authority of law." No action, moreover, has taken place by the legislature of the state, upon the subject of the surrender of fugitives to foreign powers. Well, how are the people to understand these provisions? To what laws, or to the laws of what country, are they directed for protection? Why, most surely, to the laws of the same state; and such as may be known and understood by the people as laws for their immediate direction and government. Laws, in short, passed by the proper authorities for the regulation of the internal and civil concerns of the state.

But a new and extraordinary doctrine has been proclaimed, and acted upon in this case. A doctrine which, if true, would prove that the people have been laboring under a delusion, and that their fancied security was but an idle dream. That they can no longer look to the general and state constitutions, and to the most positive legislative injunctions, for protection and defence. That they cannot, as they have been taught to suppose, lay their hand upon the book containing them, and say—This is our political Bible; this is the rock of our political salvation; upon which we can rest in security, even against the blowing of the winds, or the coming of the storms. No! on the contrary, they are now directed to Grotius, to Puffendorf and Vattel, to learn what measure of personal liberty they are entitled to, and under what circumstances they can repose in safety in the midst of their families.

It appears, that the King of England, with all the royal prerogatives, does not possess the power which is claimed for the governor of the state of Vermont. The provision of the constitution of that state to which I have referred, was copied from the great charter of English liberty, and has been there understood in a different sense. Sir W. Blackstone, in the first volume of his celebrated Commentaries, makes the following remarks: "A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it, except by the sentence of the law. No power on earth, but the authority of the parliament, can send any subject of England out of the land against his will; no! not even a criminal. To *560] this purpose, the great charter declares, *that no freeman shall be imprisoned, unless by the judgment of his peers, or by the law of the land."

In Canada, the governors have uniformly refused to deliver up British subjects, because their *habeas corpus* act protects them. In order to place this point in a clear light, I will give an extract or two from the letter already referred to, of Lord Aylmer, to Governor Marcy, dated the 27th of May 1833: "I have been under the necessity of delaying an answer to your Excellency's letter of the 4th of April last, in consequence of objections raised by the attorney-general of the province, to the surrendering of the four individuals charged with the murder of Elizabeth Stevenson; that officer being of opinion, that it was not competent to the executive, in the absence of any regulation by treaty, or legislative enactment on the subject, to dispense with the provision in the *habeas corpus* act." Again, he says, "the subject has received every consideration, and I very much regret to say, that the opinion of the attorney-general is confirmed by a majority of those who have been called upon."

We have seen, then, that no president of the United States, no governor of Canada, and lastly, no king of England, has ventured to act in a case of this kind, except by legislative authority, or by treaty, which is tantamount to a law. Yet we have lived to witness the attempt of the governor of one of the states in this land of freedom, to break over all legal and constitutional restraints, and of his own will and authority, to exercise this arbitrary, this tremendous power, over the liberties of the people.

Let me here declare, that I do not mean to be understood as contending, that the clause in the constitution of the United States which is relied upon, can be brought to bear upon every unlawful or irregular act in the course of judicial or other proceedings under the laws of the states, by which a person might be deprived of his liberty, and for which he might bring an action of false imprisonment, or have his *habeas corpus*, before the proper tribunals or authorities. But it certainly does appear to me, that when the executive of a state, in the exercise of a governmental power, and simply by virtue of his office, undertakes to issue an order for the arrest and transportation of an individual, for a cause over which the state has invested his department of the government with no authority or jurisdiction whatever; this court has, by its appellate power, under the 25th section of the judiciary act of 1789, the right to interpose its protection, and to enforce the provision in question.

If I have succeeded, then, in showing that the act now complained of

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was wholly without law or authority ; it follows, that the position has been sustained, even admitting the jurisdiction of the states, yet that the plaintiff in error has been "deprived of his liberty, without due process of law," and therefore, in violation of the constitution of the United States. And thus have I completed the observations which I designed to make upon the several questions involved in the case before the court.

*TANEY, Ch. J.—The court have held this case under consideration for some time ; and as the end of the term is now approaching, it is [*561 proper to dispose of it. The members of the court, after the fullest discussions, are so divided, that no opinion can be delivered as the opinion of the court. It is, however, deemed advisable, in order to prevent mistakes or misconstruction, to state the opinions we have respectively formed. And in the opinion which I am now about to express, I am authorized to say, that my brothers STORY, McLEAN and WAYNE, entirely concur.

This case presents a question of great importance, upon which eminent jurists have differed in opinion. Can a state, since the adoption of the constitution of the United States, deliver up an individual found within its territory, to a foreign government, to be there tried for offences alleged to have been committed against it? This involves an inquiry into the relative powers of the federal and state governments, upon a subject which is sometimes one of great delicacy. In the case before us, the party concerned is an obscure individual, not a citizen of the United States ; and who is not likely to attract any great share of public attention. But in times of war and of high excitement, the principle now to be decided may reach cases where great public interests are concerned ; and where the surrender may materially affect the peace of the Union. We are fully sensible of the importance of the inquiry, and of the necessity of approaching it with the utmost deliberation and caution.

There is, however, a preliminary point to be disposed of. It has been suggested, that the question above mentioned cannot be brought here, in the form in which it appears in this record ; and that we have not jurisdiction to re-examine the judgment of the supreme court of Vermont, pronounced in summary proceeding by *habeas corpus*.

The case in the record is this : George Holmes, the plaintiff in error, was arrested in the state of Vermont, on a warrant or order issued by Silas H. Jennison, as governor of the state, and directed to John Starkweather, sheriff of the county of Washington, in said state, setting forth, that an indictment had been found by a grand jury of the district of Quebec, in the British province of Lower Canada, against the said Holmes, for the crime of murder, alleged to have been committed within the said district of Quebec ; and that as it was fit and expedient, that he should be made amenable to the laws of the country where the offence was charged to have been committed, the said Starkweather was commanded to convey the body of the said Holmes to some convenient place on the confines of the state of Vermont, and the province of Lower Canada, and there deliver him to such persons as might be empowered by the Canadian authorities to receive him ; to the end that he might be there dealt with as to law and justice appertained. On the application of Holmes, a writ of *habeas corpus* was issued

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by the supreme court of the state of Vermont, commanding the *said Starkweather to bring into court the body of the said Holmes ; and in the return to this writ, the warrant or order of the governor of the state, as above decribed, was set forth as the cause of the said arrest and detention.

Holmes being brought into court, in obedience to the said writ of *habeas corpus*, his counsel moved for his discharge ; and at the same time introduced in evidence certain documents which appear in the record (but which it is unnecessary to state here), for the purpose of showing that the Governor had no lawful right to surrender him. The record then proceeds to state the judgment of the court in the following words : " Wherefore, after a full hearing of the parties, and all and singular the premises aforesaid being seen and fully examined, it is adjudged by the court here, that the aforesaid cause of detention and imprisonment of the said George Holmes is good and sufficient in law ; and that he be remanded and held accordingly, under the process set forth in the return to this writ of *habeas corpus*."

It will be seen, from the foregoing statement, that the proceedings in question were in the highest court of the state of Vermont ; that the judgment is formally and fully entered on its records ; and it is evident from the very terms of the judgment, that the validity of the governor's warrant was drawn in question, and decided by the court. It will hardly be said, after this judgment, that the governor was not acting in this business under the authority of the state. There is, indeed, no statute of Vermont giving him the power he exercised. But his conduct has been fully examined by the highest judicial tribunal in the state, and they have adjudged, that the warrant issued by him was authorized by law, and bound the sheriff to hold the prisoner, and deliver him, in the manner directed, to the Canadian authorities. We must receive this decision as conclusive evidence of the laws of Vermont upon this subject ; and consequently, the proceedings of the governor must be taken as justified by the laws of the state, and treated as an authority exercised under it. Here, then, is precisely one of the cases in which the writ of error is given in the 25th section of the act of 1789.

The authority was exercised by Governor Jennison, under the state. That authority has been drawn in question in the highest court of law in the state, upon the ground, that it was repugnant to the constitution of the United States ; and the decision was in favor of the validity of the authority so exercised. The only inquiry, therefore, upon the question of jurisdiction, is, whether there has been such a judgment in such a proceeding as is described in that section ; in other words, whether the judgment of the supreme court of Vermont, above stated, was a " final judgment " " in a suit," within the meaning of the act of congress. As to the final character of the judgment, the question may be disposed of in a few words. In order to determine whether a judgment is final or not, we must first inquire, what is in controversy. *In this case, the validity of the governor's warrant was the only question before the supreme court of Vermont, and that question was certainly finally settled ; for the court, in so many words, adjudged that the cause of the detention and imprisonment of Holmes was good and sufficient in law ; and nothing more remained in the case for the action of the court. The sheriff, upon their judgment, must have proceeded to execute the warrant, and have delivered the pris-

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oner to the Canadian authorities, without further delay, if the proceedings had not been suspended in consequence of the writ of error to this court.

In the case of *Weston v. City Council of Charleston*, 2 Pet. 464, this court, speaking of the meaning of the word final, in the section in question, say, "If it (the word *final*) were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than congress could have intended. Judgments in actions of ejectment, and decrees in chancery, dismissing a bill without prejudice, however deeply they might affect rights protected by the constitution, laws or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties; and this court would not revise and correct the judgment. The word 'final' must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause." We have given this long extract from the opinion of the court, because it shows not only the construction which this court have given to the act of congress, but the reasons on which its decision has been founded. In the case now under consideration, the judgment given by the supreme court of Vermont certainly determined the particular case before them; and was, therefore, final, within the meaning of the act of congress.

It is not, however, sufficient, that the decision was final; it must also be made in a "suit," in order to give this court the right to re-examine it upon writ of error. Was this proceeding before the supreme court of Vermont a "suit?" The question can hardly, at this time, be considered as an open one in this court. It has been examined in several cases, depending on principles entirely analogous, and the jurisdiction sustained, upon the fullest consideration. It is true, that in England different opinions have been entertained upon the question, whether a writ of error would lie from the refusal of a court to discharge a party brought before it on a *habeas corpus*. And in the reign of Queen Anne, in the case of the *Queen v. Paty and others*, commonly called the *Aylesbury Case*, there was an angry controversy upon the subject, between the house of peers and the house of commons; in which the privileges of the latter house were particularly involved. The case is reported in 2 Salk. 503, and 2 Ld. Raym. 1105; and is fully detailed in 8 State Trials, 90-163. In the view, however, *that we take of this subject, it is unnecessary to examine particularly the English [*564 cases. They are collected together and fully examined in the court for the correction of errors, in the case of *Yates v. People of the State of New York*, 6 Johns. 337. We refer to them merely to show that they have not been overlooked. They will be found to turn mainly upon the technical meaning applied there to the word "judgment;" in which the form in which the proceedings were had, and the decision entered, was perhaps deemed more material than the subject-matter, in order to give to the decision the character of a judgment in a suit.

But with all the strictness upon the subject in the English courts, we are not aware of any case there in which it has been held, that a writ of error would not lie from the judgment of a court of record, deciding, upon the return of the *habeas corpus*, that the warrant under which the party was held

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was sufficient in law to authorize his arrest and detention. Certainly, no such decision was given to the case of the *Queen v. Paty and others*, just mentioned ; and we think it would be difficult to assign any good reason for refusing the writ of error. If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court, to recover his liberty. In order to be effectual for the purposes for which it is intended, the proceedings must be summary ; and the law has accordingly made them so. And if an officer of a state government, in the exercise of an authority forbidden by the constitution of the United States, has deprived an individual of his liberty, why should it be supposed, that the summary character of the proceedings by which he must seek to recover it, would be deemed by congress a sufficient reason for denying him the writ of error to this court ? For this, in effect, is the whole amount of the objection.

It is said, that this is not a final judgment in a suit ; and that, therefore, the act of 1789 does not give the writ of error to this court. But whatever would, at this day, be the doctrine of the English courts, in similar cases, we consider that the construction of the act of congress of 1789, upon this subject, has been settled by repeated decisions, in favor of the jurisdiction. The cases decided were not, indeed, cases of proceedings and judgments upon *habeas corpus*, but arose and were decided upon applications for writs of *mandamus* and of prohibition. Yet cases of that description stand upon the same principles with the proceedings on a *habeas corpus*, so far as the question now under consideration is concerned. For in cases of *mandamus* and prohibition, the proceedings, like those upon a *habeas corpus*, are summary ; and the judgment given is not final, in the sense in which that word is used in relation to common-law judgments. And if, under the act of 1789, no writ of error would lie, except in cases where the suit was brought, the proceedings had, and the judgment entered, according to the forms of a suit at common law ; then the writ could not be sustained in cases where a peremptory *mandamus* or a prohibition has
 *565] been awarded or refused. In *cases of that description, however, the construction of the act of congress has been settled in this court and settled, as we think, according to the true import of its words. The construction given to it, in these cases, entitled the present plaintiff in error, as a matter of right, to have the judgment rendered against him by the supreme court of Vermont re-examined in this court.

Before, however, we proceed to refer more particularly to the decisions heretofore given, it is proper to remark, that there is no material difference between the language of the law giving the writ of error from the judgment of the circuit court for the district of Columbia, and the language used in the 22d and 25th sections of the act of 1789, so far as relates to the forms of proceeding, and the nature of the judgment. Undoubtedly, there are a multitude of cases in which a writ of error will lie from the judgment of a circuit court, where it would not lie to this court from a judgment rendered in a similar controversy in a state court. But our present inquiry has nothing to do with that distinction. We are speaking merely of the nature of the proceeding in this case, and examining whether it is of that description that, under the 25th section of the act of 1789, will authorize a writ of error. The writ in that section is given from any "final judgment" "in a suit." In the act relating to the district of Columbia, it is given from any "final judg-

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ment." In the 22d section of the act of 1789, it is given from "final judgments" "in civil actions." These different forms of expression have always been held to mean the same thing; and consequently, the decision of this court upon one of them is equally applicable to the others. With this explanation, we proceed to inquire, whether the *habeas corpus* was "a suit." We have already shown, that in these proceedings, an authority exercised under a state was drawn in question; that the decision was in favor of the authority; and that the judgment of the court was final. The remaining question is, were these things done in a suit?

The first case in which this question appears to have arisen, was that of the *Columbian Insurance Company v. Wheelright*, 7 Wheat. 534. The circuit court for the district of Columbia had, in that case, awarded a peremptory *mandamus*, to admit the defendants to the offices of directors in the said insurance company. The company, thereupon, brought a writ of error to the supreme court, and the question whether a writ of error would lie, from the order of a court awarding a peremptory *mandamus*, was directly presented. It was argued by counsel, and decided by the court; and it was ruled, that the writ of error would lie. It is true, that this case was decided under the act of congress relating to the district of Columbia. But in delivering the opinion, the court remark, that the law relating to the district, under which that case arose, was "similar in its provisions with the judiciary act of 1789, ch. 20, § 22." The decision, therefore, in that case, was, in effect, a decision upon the construction of the act of 1789.

*The same interpretation was again given to this act of congress, in the case of *Kendall v. United States*, 12 Pet. 524. The question [*566 of jurisdiction was in that case most fully and deliberately considered by the court. The English and American cases on the subject were carefully examined and discussed; and all of the objections taken in the English books, and arising from the summary form of the proceeding, and the nature of the decision, were brought forward and considered by the court. But the case of the *Columbian Insurance Company v. Wheelright*, was supposed to have settled the question; and the jurisdiction was sustained. There was no written opinion by the court on this point; but the case is a recent one, and the circumstances above mentioned are yet fresh in the recollection of the members of the court. After these two decisions, whatever may be regarded as the doctrines of the English courts in such cases, the question whether a writ of error will lie under the 22d section of the act of 1789, from the judgment of a court awarding a peremptory *mandamus*, can hardly be considered as open for discussion in this court.

We have already mentioned, that a writ of error, under the 25th section, so far as it depends on the forms of proceeding, and the nature of the judgment, must be governed by the same rules that apply to similar writs under the 22d section, and under the act relating to the district of Columbia. But the case of *Weston v. City Council of Charleston*, 2 Pet. 449, which has already been referred to, arose on the 25th section itself, and appears to us to be decisive of the point in question. In that case, a prohibition had been obtained by the plaintiffs in error, from the court of common pleas of South Carolina, for the Charleston district, to restrain the city council of Charleston from levying a tax upon the stock of the United States, held by residents of the city. The city council remove the case by writ of error to the

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constitutional court, the highest court of law in the state, where the decision of the court of common pleas was reversed ; and the ordinance imposing the tax held not to be repugnant to the constitution of the United States. From this decision, a writ of error was brought to this court, and the question was raised here, whether a prohibition was a suit, within the meaning of the act of 1789. The court held that it was ; and Chief Justice MARSHALL, in delivering the opinion of the court, says, "Is a writ of prohibition a suit ? The term is certainly a very comprehensive one ; and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various ; but if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit." We entirely concur in the definition thus given of the meaning of the word "suit," as used in the act of 1789. It makes the act *567] of congress consistent with the principles of justice, and interprets *it according to the natural meaning of its words : and it is too plain for argument, that according to this definition, the proceeding upon the *habeas corpus* was a suit in the supreme court of Vermont. A right claimed by the prisoner Holmes, under the constitution of the United States, was litigated between him and the governor of the state, and the sheriff of the county, in a court of justice. The proceedings by *habeas corpus* by which the decision of the court was sought, was, in the language of the case referred to, a suit ; and we cannot, therefore, refuse to take jurisdiction upon this writ of error, without disregarding the deliberate decisions of this court.

It is very true, that neither the case just mentioned, nor the cases before referred to, were writs of error upon a refusal to discharge on *habeas corpus*. But in the English cases, the authorities are stronger in favor of the writ of error in the case of the *habeas corpus*, than in the case of the *mandamus*. The house of lords affirmed the judgment of the court of king's bench, which decided that a writ of error would not lie to that court, from the judgment of the court of king's bench of Ireland, awarding a peremptory *mandamus*. But the house of lords, which is the highest judicial tribunal in England, have never by any decision countenanced the idea, that a writ of error would not lie from the refusal of the court of king's bench to discharge a party on *habeas corpus*. On the contrary, in the *Aylesbury Case*, before mentioned, they decided, that a writ of error ought to be issued to bring the question before them. The commons, indeed, vehemently denied that the writ would lie ; but it will be remembered, that the Aylesbury men had been imprisoned by the house of commons, for a breach of privilege ; and that house was naturally excited by a proceeding which would have made the house of lords in a great measure the judges of the privileges of the commons. It is not in heated conflicts of this description, between two legislative bodies, concerning their respective privileges, that we are to look for calm and precise judgments on questions of law ; and neither the opinion of the lords nor the commons, expressed under such circumstances, ought to be esteemed as safe guides in a court of justice. It is certain, however, that the question whether a writ of error would lie in such a case, was then an open one, upon which the two houses differed in opinion. In New York, in the case of *Yates v. People*, before mentioned, it was decided in the court for the correction of errors, that a writ of error would lie from the refusal of the

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supreme court of the state to discharge a party on *habeas corpus*. There was, indeed, great division of opinion in the court, and so many eminent and distinguished judges dissented from the judgment given, that we do not feel authorized to refer to it as having settled the question in New York. Yet that case, as well as the English cases, show, that the point has been a doubtful one, and that the right to the writ of error in the case of the *habeas corpus* has always stood on firmer and better ground than in the case of the **mandamus*. And we refer to these cases, to show, among other [*568 things, that the supreme court, in the decisions before mentioned, have not overturned established principles ; that they have merely settled doubtful questions, and have not settled them against the weight of judicial authority ; and as the construction they have given to the word suit, in the act of 1789, is well calculated to promote the great ends of justice, and undoubtedly conforms to the intention of the legislature ; we perceive no sufficient reason for setting it aside, or departing from it. Under the authority of these decisions, therefore, we hold that the judgment of the Vermont court, now before us, was a final judgment in a suit ; and the plaintiff in error is, therefore, entitled to have it re-examined in this court by writ of error.

The case being thus before this court, it becomes our duty to inquire, whether the authority exercised by the governor of Vermont, was repugnant to the constitution of the United States? In this part of the case, it may be well to inquire into the nature and extent of the powers which have been claimed and exercised by the governor of Vermont. It is the power to surrender any one found within the jurisdiction of the state, who has committed an offence in a foreign country. The individual to be surrendered on this occasion was a resident of Canada. But if the state possesses the power of delivering up fugitives from justice who, having committed offences in a foreign country, have fled to this for shelter, the power, as known to the laws of nations, is not confined to the subjects or residents of the country where the offence was committed. It is limited only by the policy of the state upon whom the demand is made. And if the surrender of Holmes is not repugnant to the constitution of the United States, there is nothing in that instrument that forbids the delivery up of a citizen of any other state, when found within its borders, who may be demanded by a foreign government, upon the ground, that he has committed some offence within its territory. And if this power remains with the states, then every state of the Union must determine for itself the principles on which they will exercise it ; and there will be no restriction upon the power, but the discretion and good feeling of each particular state.

Again, the question under this *habeas corpus* is in no degree connected with the power of the states to remove from their territory any person whose presence they may think dangerous to their peace, or in any way injurious to their interests. The power of the states in that respect was fully considered by this court and decided, in the case of *New York v. Miln*, 11 Pet. 102. Undoubtedly, they may remove from among them any person guilty of, or charged with, crimes ; and may arrest and imprison them, in order to effect this object. This is a part of the ordinary police powers of the states, which is necessary to their very existence, and which they have never surrendered to the general government. They may, if they think

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proper, in order to deter offenders in other countries from *coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction. In all of these cases, the state acts with a view to its own safety ; and is in no degree connected with the foreign government in which the crime was committed. The state does not co-operate with a foreign government, nor hold any intercourse with it, when she is merely executing her police regulations. But in the case of Holmes, it is otherwise. The state acts, not with a view to protect itself, but to assist another nation which asks its aid. Holmes is not removed from the state of Vermont, as a man so stained with crimes as to render him unworthy of the hospitality of the state ; but he is delivered up to the Canadian authorities, as an act of comity to them. This is not the exercise of a police power, which operates only upon the internal concerns of the state, and requires no intercourse with a foreign country, in order to carry it into execution ; it is the comity of one nation to another, acting upon the laws of nations, and determining, for itself, how far it will assist a foreign nation in bringing to punishment these who have offended against its laws.

The power which has thus been exercised by the state of Vermont, is a part of the foreign intercourse of this country ; and has undoubtedly been conferred on the federal government. Whether it be exclusive or not, is another question, of which we shall hereafter speak. But we presume, that no one will dispute the possession of this power by the general government. It is clearly included in the treaty-making power, and the corresponding power of appointing and receiving ambassadors and other public ministers. The power to make treaties is given by the constitution, in general terms, without any description of the objects intended to be embraced by it ; and consequently, it was designed to include all those subjects, which, in the ordinary intercourse of nations, had usually been made subjects of negotiation and treaty ; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments. And without attempting to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it ; it may safely be assumed, that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government. And as the rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law ; it follows, that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognised and enforced, when it demands the surrender of any one charged with offences against it.

The practice of the government, from the early days of its existence, conforms to this opinion. In the letter of Mr. Jefferson to Mr. Genet, of September 12th, 1793 (1 Am. State Pap. 175), he speaks of the right of the general government in this respect, as if it was *undisputed. And *570] in the treaty negotiated with England by Mr. Jay, during the administration of General Washington, there was an article stipulating for the mutual delivery of persons charged with murder or forgery. The case of *Jonathan Robins*, which was the only one that arose under this treaty,

produced much excitement in the country, and animated debates in congress. Yet the power of the general government to enter into such an engagement was never questioned; the objections to the surrender of the party rested upon other grounds.

Indeed, the whole frame of the constitution supports this construction. All the powers which relate to our foreign intercourse are confided to the general government. Congress have the power to regulate commerce; to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; to declare war; to grant letters of marque and reprisal; to raise and support armies; to provide and maintain a navy. And the president is not only authorized, by and with the advice and consent of the senate, to make treaties; but he also nominates, and, by and with the advice and consent of the senate, appoints ambassadors and other public ministers, through whose agency negotiations are to be made and treaties concluded. He also receives the ambassadors sent from foreign countries; and everything that concerns our foreign relations, that may be used to preserve peace or to wage war, has been committed to the hands of the federal government. The power of deciding whether a fugitive from a foreign nation should or should not be surrendered, was, necessarily, a part of the powers thus granted.

It being evident, then, that the general government possesses the power in question, it remains to inquire, whether it has been surrendered by the states? We think it has: and upon two grounds. 1. According to the express words of the constitution, it is one of the powers that the states are forbidden to exercise without the consent of congress. 2. It is incompatible and inconsistent with the powers conferred on the federal government.

The first clause of the tenth section of the first article of the constitution, among other limitations of state power, declares, that "no state shall enter into any treaty, alliance or confederation;" the second clause of the same section, among other things, declares, that no state, without the consent of congress, shall "enter into any agreement or compact with another state, or with a foreign power." We have extracted only those parts of the section that are material to the present inquiry. The section consists of but two paragraphs; and is employed altogether in restrictions upon the powers of the states. In the first paragraph, the limitations are absolute and unconditional; in the second, the forbidden powers may be exercised with the consent of congress: and it is in the second paragraph, that the restrictions are found which apply to the case now before us.

In expounding the constitution of the United States, every word *must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or [*571 needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning; and this principle of construction applies with peculiar force to the two clauses of the tenth section of the first article, of which we are now speaking, because the whole of this short section is directed to the

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same subject ; that is to say, it is employed altogether in enumerating the rights surrendered by the states ; and this is done with so much clearness and brevity, that we cannot for a moment believe, that a single superfluous word was used, or words which meant merely the same thing. When, therefore, the second clause declares, that no state shall enter into "any agreement or compact" with a foreign power, without the assent of congress, the words "agreement" and "compact," cannot be construed as synonymous with one another ; and still less can either of them be held to mean the same thing with the word "treaty" in the preceding clause, into which the states are positively and unconditionally forbidden to enter ; and which even the consent of congress could not authorize.

In speaking of the treaty-making^a power conferred on the general government, we have already stated our opinion of the meaning of the words used in the constitution, and the objects intended to be embraced in the power there given. Whatever is granted to the general government is forbidden to the states, because the same word is used to describe the power denied to the latter, which is employed in describing the power conferred on the former ; and it is very clear, therefore, that Vermont could not have entered into a treaty with England, or the Canadian government, by which the state agreed to deliver up fugitives charged with offences committed in Canada.

But it may be said, that here is no treaty ; and, undoubtedly, in the sense in which that word is generally understood, there is no treaty between Vermont and Canada. For when we speak of "a treaty," we mean an instrument written and executed with the formalities customary among nations ; and as no clause in the constitution ought to be interpreted differently from the usual and fair import of the words used, if the decision of this case depended upon the word above mentioned, we should not be prepared to say, that there was any express prohibition of the power exercised by the state of Vermont. But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the constitution, the states are forbidden to enter into any "agreement" or "compact" with a foreign nation ; and as these words could not have been idly or superfluously *572] used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive.

A few extracts from an eminent writer on the laws of nations, showing the matter in which these different words have been used, and the different meanings sometimes attached to them, will, perhaps, contribute to explain the reason for using them all in the constitution ; and will prove that the most comprehensive terms were employed in prohibiting to the states all intercourse with foreign nations. Vattel, p. 192, § 152, says, "A treaty, in Latin *foedus*, is a compact made with a view to the public welfare, by the superior power, either for perpetuity, or for a considerable time." § 153. "The compacts which have temporary matters for their object, are called agreements, conventions and pactions. They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution, once for all ; treaties receive a successive execution, whose duration equals that of the treaty." § 154. Public treaties can only be made

by the "supreme power, by sovereigns who contract in the name of the state. Thus, conventions made between sovereigns respecting their own private affairs, and those between a sovereign and a private person, are not public treaties." § 206, p. 218. "The public compacts called conventions, articles of agreement, &c., when they are made between sovereigns, differ from treaties only in their object."

After reading these extracts, we can be at no loss to comprehend the intention of the framers of the constitution in using all these words, "treaty," "compact," "agreement." The word "agreement," does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an "agreement." And the use of all of these terms, "treaty," "agreement," "compact," show that it was the intention of the framers of the constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal positive or implied, by the mutual understanding of the parties.

Neither is it necessary, in order to bring the case within this prohibition, that the agreement should be for the mutual delivery of all fugitives from justice, or for a particular class of fugitives. It is sufficient, if there is an agreement to deliver Holmes. For the prohibition in the constitution applies not only to a continuing agreement, embracing classes of cases, or a succession of cases, but to any agreement *whatever. An agreement to deliver Holmes is, therefore, forbidden; and as much so, as if it were an agreement to deliver all persons in the same predicament. Is there not, then, in this case an agreement on the part of Vermont to deliver Holmes? And is he not detained in custody, to be delivered up, pursuant to this agreement?

It must be remembered, that states can act only by their agents and servants; and whatever is done by them, by authority of law, is done by the state itself. The supreme court of Vermont, as we have already mentioned, have decided, that the warrant of the governor, and the detention of Holmes under it, are authorized by law. Consequently, the seizure for the purpose of delivery, the agreement on the one side to deliver, and on the other to receive, is an agreement made by the authorized servants of the state; and, of course, in contemplation of law, made by the state itself. The record before us does not state the application of the governor of Canada for the arrest and delivery of Holmes, although, from the nature of the transaction, doubtless, such an application was made. As it does not, however, appear in the record, we do not act upon the supposition that such a demand was made, nor consider it as in the case. The question is not, whether there was a demand, but whether there was an agreement with a foreign power; and the governor's warrant, of itself, imports an agreement with the Canadian authorities. It directs Holmes to be delivered "to William Brown, the agent of Canada, or to such person or persons as by the laws of the province are authorized to receive him." How is he to be delivered, unless they accept? And if the authorities of Vermont agree to

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deliver him, and the authorities of Canada agree to accept, is not this an agreement between them? From the nature of the transaction, the act of delivery necessarily implies a mutual agreement.

Every one will admit, that an agreement, formally made, to deliver up all offenders who, after committing crimes in Canada, fly for shelter to Vermont, would be unconstitutional on the part of the state. So, an agreement, after Holmes had escaped to Vermont, written and signed by the state and provincial authorities, by which the governor of Vermont engaged to seize him and deliver him up to the Canadian officers, would, unquestionably, be unconstitutional. Yet precisely the same thing is done in this case, without a regular and formal agreement. It is, in some way or other, mutually understood by the parties, that he shall be seized and delivered up; and he is seized, accordingly, in order to be delivered up, pursuant to this understanding. Can it be supposed, that the constitutionality of the act depends on the mere form of the agreement? We think not. The constitution looked to the essence and substance of things, and not to mere form. It would be but an evasion of the constitution, to place the question upon the formality with which the agreement is made. The framers of the constitution manifestly believed, *that any intercourse between a state *574] and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves, to obtain influence in separate states. Provisions were, therefore, introduced, to cut off all negotiations and intercourse between the state authorities and foreign nations. If they could make no agreement, either in writing or by parol, formal or informal, there would be no occasion for negotiation or intercourse between the state authorities and a foreign government. Hence, prohibitions were introduced, which were supposed to be sufficient to cut off all communication between them.

But if there was no prohibition to the states, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States. It is admitted, that an affirmative grant of a power to the general government, is not, of itself, a prohibition of the same power to the states; and that there are subjects over which the federal and state governments exercise concurrent jurisdiction. But, where an authority is granted to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive; and the same power cannot be constitutionally exercised by the states.

The exercise of the power in question by the states, is totally contradictory and repugnant to the power granted to the United States. Since the expiration of the treaty with Great Britain, negotiated in 1793, the general government appears to have adopted the policy of refusing to surrender persons, who, having committed offences in a foreign nation, have taken shelter in this. It is believed, that the general government has entered into no treaty stipulations upon this subject, since the one above mentioned; and in every instance where there was no engagement by treaty to deliver, and a demand has been made, they have uniformly refused, and have denied the right of the executive to surrender, because there was no treaty, and no law of congress to authorize it. And acting upon this principle throughout, they have never demanded from a foreign government any one who fled

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from this country in order to escape from the punishment due to his crimes.

This being the policy of the general government, is not the possession of the power by the states totally contradictory and repugnant to the authority conferred on the federal government? What avails it, that the general government, in the exercise of that portion of its power over our foreign relations, which embraces this subject, deems it wisest and safest for the Union, to enter into no arrangements upon the subject, and to refuse all such demands; if the state in which the fugitive is found, may immediately reverse this decision, and deliver over the offender to the government that demands him? If the power remains in the states, the grant to the general government is nugatory and vain; and it would be in the power of any state, to overturn and defeat the decisions of the general government, *upon a subject admitted to be within its appropriate sphere of action; and to have been clearly and necessarily included in the [*575 treaty-making power.

The power in question, from its nature, cannot be a concurrent one, to be exercised both by the states and the general government. It must belong, exclusively, to the one or the other. If it were merely the power to surrender the fugitive, it might be concurrent; because either might seize and surrender, whose officers could first lay hold of him. But the power in question, as has already been stated, is a very different one. It is the power of deciding the very delicate question, whether the party demanded ought, or ought not, to be surrendered. And in determining this question, whether the determination is made by the United States or a state, the claims of humanity, the principles of justice, the laws of nations, and the interests of the Union at large, must all be taken into consideration, and weighed, when deliberating on the subject. Now, it is very evident, that the councils of the general government and of the state may not always agree on this subject. The decision of the one may stand in direct opposition to the decision of the other. How can there be a concurrent jurisdiction in such a case? They are incompatible with each other, and one must yield. And it being conceded on all hands, that the power has been granted to the general government, it follows, that it cannot be possessed by the states; because its possession on their part would be totally contradictory and repugnant to the power granted to the federal government.

Again, how are the states to exercise this power? We must not look at the power claimed, as if it were confined to fugitives from Canada into the bordering states. The constitution makes no distinction in that respect; and if the state has the power in this instance, it has the same power in relation to fugitives from England, or France or Russia. Now, how is a state to hold communications with these nations? The states neither send nor receive ambassadors to or from foreign nations. That power has been expressly confided to the federal government. How, then, are negotiations to be carried on with a state, when a fugitive is demanded? Are they to treat upon this subject with the ambassador received by the United States? And is he, after being refused by the general government, to appeal to the state to reverse that decision? Such, certainly was not the intention of the framers of the constitution, and cannot be its true construction. Every part of that instrument shows, that our whole foreign intercourse was

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intended to be committed to the hands of the general government ; and nothing shows it more strongly than the treaty-making power, and the power of appointing and receiving ambassadors ; both of which are immediately connected with the question before us, and undoubtedly belong exclusively to the federal government. It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation ; and to cut off all communications between foreign *576] governments, and the several state authorities. The power now claimed for the states, is utterly incompatible with this evident intention ; and would expose us to one of those dangers, against which the framers of the constitution have so anxiously endeavored to guard.

But it may be said, that the possession of the power to surrender fugitives to a foreign nation by the states, is not incompatible with the grant of the same power to the United States ; and that in the language of this court, in the case of *Sturges v. Crowninshield*, 4 Wheat. 196, "it is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." And the case before us may, perhaps, be likened to those cases in which affirmative grants of power to the general government, have been held not to be inconsistent with the exercise of the same powers by the states, while the power remained dormant in the hands of the United States.

This principle is, no doubt, the true one, in relation to the grants of power, to which it is applied in the case above mentioned of *Sturges v. Crowninshield*. For example, the grant of power to congress to establish "uniform laws on the subject of bankruptcies throughout the United States," does not of itself carry with it an implied prohibition to the states to exercise the same powers. But in the same case of *Sturges v. Crowninshield*, another principle is stated, which is equally sound, and which is directly applicable to the point before us ; that is to say, that it never has been supposed, that the concurrent power of state legislation extended to every possible case in which its exercise had not been prohibited. And that whenever "the terms in which a power is granted to congress, or the nature of the power requires that it should be exercised exclusively by congress ; the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it." This is the character of the power in question. From its nature, it can never be dormant in the hands of the general government.

The argument which supposes this power may be dormant in the hands of the federal government, is founded, we think, in a mistake as to its true nature and character. It is not the mere power to deliver up fugitives from other nations upon demand ; but the right to determine whether they ought or ought not to be delivered, and to make that decision, whatever it may be, effectual. It is the power to determine whether it is the interest of the United States to enter into treaties with foreign nations, generally, or with any particular foreign nations, for the mutual delivery of offenders fleeing from punishment from either country ; or whether it is the interest and true policy of the United States, to abstain altogether from such engagements, and to refuse, in all cases, to surrender them. In the case first above supposed, it will be admitted, that if the United States have entered into such treaties, the states could not interfere, be-

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cause the United States will then have exercised the power ; and the exercise of the same power by the states would be altogether contradictory and repugnant. It is in the latter case, where they *refuse to treat and refuse to surrender, that the power is supposed to be dormant, [*577 and not exercised by the federal government. But is not this a mistake as to the nature of the power? And is it not as fully exercised by the decision not to surrender, as it could be by a decision the other way? The question to be decided is a question of foreign policy ; committed, unquestionably, to the general government. The federal government has also the power to declare war ; and whenever it becomes a question whether we are to be at peace or at war, undoubtedly, the general government must determine that question. And if congress decides that the honor and interest of the country does not require war, and, on that account, refuses to declare it, is not this an exercise of its power over the subject? And could it be said, that the power was a dormant power, because war had not been declared.

There is, however, an express prohibition to the states to engage in war ; and perhaps the case of ambassadors would be more analogous to the one under consideration. The power of appointing "ambassadors, other public ministers and consuls," is given to the federal government ; and there is no prohibition to the exercise of the same power by the states. Now, if the general government deemed it to be the true policy of the country to have no communication or connection with foreign nations, by ambassadors, other public ministers or consuls ; and refused, on that account, to appoint any ; could it be said, that this power was dormant in the hands of the government, and that the states might exercise it? Or if the general government deemed it advisable to have no such communications with some particular foreign nation, could any state regard it as an unexercised power, and therefore, undertake to exercise it? We can readily imagine, that there may be reasons of policy, looking to the whole Union, that might induce the government to decline an interchange of ambassadors with certain foreign countries. It is not material to the question in hand, whether that policy be right or wrong. But assuming such a case to exist, can any state regard it as an unexecuted portion of the power granted to the federal government ; and, by appointing an ambassador or consul, counteract its designs and thwart its policy? There can be but one answer, we think, given to this question. And yet the case before us, is in all respects like it. It is a portion of our foreign policy, and of our foreign intercourse. The general government must act, for it is the only nation known to foreign powers ; and as their ambassadors are accredited to the United States, and not to the states, whatever demands they have, they must address to the general government. And in every case, therefore, where an offender, such as we are speaking of, is within the United States, and the foreign government desires to get possession of him ; the demand must be made on the general government ; and they are as much bound to decide upon it, as they are upon a question of sending or receiving an ambassador, or a question of peace or war. How, then, can a state exercise a concurrent power, or any power on the same question? In the language *of the supreme court, in the case of *Houston v. Moore*, 5 Wheat. 23, "we are altogether incapable of [*578 comprehending how two distinct wills can, at the same time, be exercised in,

relation to the same subject, to be effectual ; and, at the same time, compatible with one another."

The confusion and disorder which would arise from the exercise of this power by the several states, is too obvious to need comment. At the present moment, when Europe is at peace, there is no strong inducement to pursue an offender who has taken refuge in this country ; and very earnest efforts, therefore, are not often made to obtain possession of the fugitive. But in the ordinary course of human affairs, this cannot always be the case ; and if civil commotions should take place in any of the great nations of Europe, powerful inducements will often exist to pursue those who may be compelled to fly from the vengeance of the victorious party. And in case a war should break out between any of the leading governments of the old world, sufficient motives will perhaps be found to make the belligerent nations extremely anxious to obtain possession of persons who may be found in some one of the United States. And how could this great national power be exercised with uniformity or advantage, if the several states were, from time to time, to determine the question ? One would probably determine to surrender for one set of offences ; another, another. One state, perhaps, would surrender for political offences ; another would not : and one state might deliver up fugitives to one nation only ; while another state would select some other foreign nation, as the only object of this comity. Such conflicting exercises of the same power would not be well calculated to preserve respect abroad or union at home. In times of high excitement, nothing but mischief could grow out of it.

Nor do we perceive any advantage that could arise to the states, at any time, from the possession of this power. It is, as we have already said, in no degree connected with their police powers ; and they can, undoubtedly, remove from their territory every description of offenders who, in the judgment of the legislature, are dangerous to the peace of the state. It may, indeed, be supposed, that along the border line which separates the Canadas from the United States, the facility of escape into another jurisdiction is a temptation to crime, and that an arrangement between the authorities of the province and the states which adjoin them, for the mutual delivery of offenders, would be advantageous to both. If such an arrangement is deemed desirable, the foresight of the framers of the constitution have provided the way for doing it, without interfering with the powers of foreign intercourse committed to the general government, or endangering the peace of the Union. Under the second clause of the tenth article of the first section of the constitution, any state, with the consent of congress, may enter into such an agreement with the Canadian authorities. The agreement would, in that event, be made under the supervision of the United States, *and the particular offences defined in which the power was

*579] to be exercised ; and the national character of the persons who were to be embraced in it, as well as the proof to be required to justify the surrender. The peculiar condition of the border states would take away all just cause of complaint from other nations, to whom the same comity was not extended ; and at the same time, the proper legal safeguards would be provided, for the protection of citizens of other states, who might happen to become obnoxious to the Canadian authorities, and be demanded as offenders against its laws. They would not be left to the unlimited discretion of the

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states in which they may happen to be found, when the demand is made ; as must be the case, if the power in question is possessed by the states.

Upon the whole, therefore, my three brothers, before mentioned, and myself, after the most careful and deliberate examination, are of opinion, that the power to surrender fugitives, who, having committed offences in a foreign country, have fled to this for shelter, belongs, under the constitution of the United States, exclusively to the federal government ; and that the authority exercised in this instance by the governor of Vermont, is repugnant to the constitution of the United States. It is, therefore, our opinion, that the judgment of the supreme court of Vermont ought to be reversed, and the cause remanded to that court ; and that it be certified to them, with the record, as the opinion of this court, that the said George Holmes is entitled to his discharge, under the *habeas corpus* issued at his instance. In the division, however, which has taken place between the members of the court, a different judgment must be entered.

THOMPSON, Justice.—This case comes up by writ of error from the supreme court of the state of Vermont, under the 25th section of the judiciary act of 1789. The proceedings in the state court which are brought here for review, have been already so fully stated, that it is unnecessary for me to repeat them. It is sufficient for me to state, simply, that these proceedings are founded upon a writ of *habeas corpus*, under which George Holmes was brought up before the supreme court, claiming to be discharged from the custody of the sheriff, when he was held under a warrant from the governor of Vermont, by which the sheriff was commanded to arrest the said George Holmes, as a fugitive from justice, from the province of Lower Canada, he having been there indicted for the crime of murder.

In the examination of this case, I shall confine myself simply to the question, whether the case comes within the 25th section of the judiciary act, so as to give this court jurisdiction and authority to review the proceedings in the supreme court of Vermont. I do not intend to examine the question, whether the proceedings upon a *habeas corpus* is "a suit," within the meaning of this *25th section ; or whether a writ of error will lie to review proceedings upon a *habeas corpus*. Although the case, upon [*580 these points, is not free from doubts ; yet, thinking as I do, that this court has not jurisdiction at all of the case, these points are of minor importance.

In the case of *Crowell v. Randell*, 10 Pet. 391, this court reviewed all the cases which had been brought before it under the 25th section, when the question of jurisdiction was brought under the consideration of the court ; which review resulted in the following conclusion : "That it has been uniformly held, that to give this court appellate jurisdiction, two things should have occurred, and be apparent upon the record. First, that some one of the questions stated in the section did arise in the court below ; and secondly, that a decision was actually made by the state court ; in the manner required by the section. If both these do not appear on the record, the appellate jurisdiction fails. That it is not sufficient to show, that such question might have occurred, or such decision might have been made, in the court below. It must be demonstrable, that they did exist, and were made. That it is not indispensable, that it should appear on the record, in *totidem verbis*, or by direct and positive statement, that the ques-

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tion was made, and the decision given by the court below on the very point ; but that it is sufficient, if it be clear from the facts stated, by just and necessary inference, that the question was made ; and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment. That it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise and was applied by the state court to the case." According to this construction of the law, it must appear, that some one of the cases put in this section of the act did, in point of fact, arise, and was, in point of fact, decided upon in the state court.

Let us test the case now before us by these rules. This record does not in any manner whatever point to the authority under which the governor of Vermont claimed to have acted. Nor is there any treaty, or law of the United States, or any particular part of the constitution alluded, to in the record, with which the power exercised by the governor is brought in conflict or decided against. In all the cases heretofore brought up under this provision in the judiciary act, the record puts the proceedings in the state court upon some specific law or authority, under which the court professed to act ; and which enabled this court to examine such claim on the part of the state court, and to see whether it fell within the revising power of this court. But as the proceedings in the case, in the state court, do not point to the authority under which the governor claimed to have acted, we are left to mere conjecture upon that point. As the case stands upon this record, it is a mere exercise of power by the governor, in arresting George *581] Holmes, for the purpose *of delivering him over to some person in Canada, authorized to receive him. This record does not show any demand, or even request, by any authority in Canada, to have this done. From anything that appears on this record, it was a self-moved action on the part of the governor, under a sense of justice ; that as he was charged with the crime of murder in Canada, and must be punished there, if anywhere, he saw fit to arrest him and send him there. Nothing appears on the record, in any manner whatever, warranting the conclusion that the state of Vermont had authorized the governor to exercise such power ; or any arrangement had been made between the state and the government of Canada upon this subject. And admitting this to have been an arbitrary exercise of power, without even the color of authority ; it does not rest with this court to control or correct the exercise of such power, unless the case is brought within some one of the three classes of cases specified in the act of congress.

There is certainly no general power vested in this court to revise any other cases. And according to the case of *Crowell v. Randell*, it must appear, either directly, or by necessary inference, that some one of these questions did, in point of fact, arise, and was decided by the court. As the record in this case does not point to any treaty, or law, or any part of the constitution of the United States, or authority embraced by it, that was drawn in question, or that has been violated by the state court ; it makes it necessary to examine more at length, the several classes of cases mentioned in this 25th section, which fall under the revising power of this court, to see whether this case can be brought within any of them. This section contains

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three specified classes. The first is, where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity. This record, certainly, does not show that any treaty or law of the United States, or any authority exercised under the United States, was drawn in question at all; and, of course, there could have been no decision against their validity; the court did not profess to act under, or against, any such source of authority. The next class is, where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity. There is no treaty or law of the United States drawn in question, nor was there any statute of Vermont in any manner under the consideration of the court, nor any decision upon the validity of a statute of that state. The record does not furnish the slightest evidence that the state of Vermont had ever passed any law on the subject; and to draw the conclusion from the mere fact of surrender by the governor, that the laws of the state had authorized it, is certainly looking to something not apparent on the record, which this court has said cannot be done. If, therefore, the present case falls at all within this class, it must be because it was the exercise of an authority repugnant to the constitution *of the United States; and then the question arises, what part of the [*582 constitution has been violated, or is in conflict with the power exercised in this cases. The argument at the bar did not point to any specific provision in the constitution that has been violated, except the fifth admendment; which declares that no person shall be deprived of life, liberty or property, without due process of law. It is unnecessary to stop to inquire, whether this case falls within that provision, if it would be brought to bear upon it; for this court has decided, that none of these amendments apply to the states, but are limitations upon the powers of the general government. 7 Pet. 247. The argument has rested principally upon the theory of our government, in relation to the treaty-making power, and the organ for conducting foreign intercourse. There is certainly no specific provision in the constitution on the subject of surrendering fugitives from justice, from a foreign country, if demanded; and we are left at large to conjecture upon various parts of the constitution, to see if we can find that such power is by fair and necessary implication embraced within the constitution: I mean, whether any such obligation is imposed upon any department of our government, by the constitution, to surrender to a foreign government a fugitive from justice. For unless there is such a power vested somewhere, it is difficult to perceive how the governor of Vermont has violated any authority given by the constitution to the general government. If such a power or obligation, in the absence of any treaty or law of congress on the subject, rests anywhere, I should not be disposed to question its being vested in the president of the United States. It is a power essentially national in its character, and required to be carried into execution by intercourse with a foreign government; and there is a fitness and propriety of this being done through the executive department of the government, which is intrusted with authority to carry on our foreign intercourse. I do not mean to enter at large into the question of surrendering to foreign governments fugitives from justice. Whatever that power, or duty, or obligation, may be, it is, in

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my judgment, not within the authority of this court to regulate or control its exercise. In order to give such power to this court, when the surrender has been made under authority of a state, it must appear to be repugnant to the constitution, or an existing law or treaty, of the United States. And unless the president of the United States is, under the constitution, vested with such power, it exists nowhere; there being no treaty or law on the subject. And it appears to me indispensably necessary, in order to maintain the jurisdiction of this court in the present case, to show that the president is vested with such power under the constitution. This record shows that such power or authority has been expressly disclaimed by the president, on an application by the governor of Vermont, in the year 1825. The secretary of state, in answer to the letter of the governor of Vermont on that subject, says, "I am instructed by the president, to express his regret to your excellency, that the request of the acting governor of Canada *583] cannot be complied with, *under any authority now vested in the executive government of the United States; the stipulation between this and the British government, for the mutual delivery over of fugitives from justice, being no longer in force, and the renewal of it by treaty, being at this time a subject of negotiation between the two governments." Here, then, is a direct denial by the president of the existence of such a power in the executive, in the absence of any treaty on the subject. And such has been the settled and uniform course of the executive government of the United States upon this subject, since the expiration of our treaty with England. And if this be so, it may be emphatically asked, what power in the general government comes in conflict with the power exercised by the governor of Vermont? In order to maintain the jurisdiction of this court, in the present case, it must be assumed, that the president has, under and by virtue of the constitution, in the absence of any treaty on the subject, authority to surrender fugitives from justice to a foreign government; otherwise, it cannot be said, that the governor of Vermont has violated the constitution of the United States. If any such power is to be given to the president by treaty, it is not merely to regulate the mode and manner of exercising an existing power; but must be a treaty creating the power, and founded upon the mere comity of nations, and not resting upon any obligation, the performance of which a foreign nation has a right to demand of our government. This power to surrender fugitives from justice, to a foreign government, has its foundation, its very life and being, in a treaty to be made between the United States and such foreign government; and is not, by the constitution, vested in any department of our government, without a treaty. The power, therefore, exercised by the governor of Vermont, can, at most, be only repugnant to a dormant power, resting entirely upon comity and reciprocity, to be established by treaty; and which may, by possibility, be brought into action at some future day, through the instrumentality of such a treaty. This, in my judgment, is too remote and contingent to fall under the protecting authority of this court, under the 25th section of the judiciary act.

The remaining class of cases embraced in this section, is, where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed

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by either party, under such clause of the said constitution, treaty, statute or commission. This class points to some particular clause in the constitution, or of a treaty, or statute or commission, held under the United States; by which a right, title, privilege or exemption is claimed, and the decision is against such claim. It may be again observed, that no treaty or law was drawn in question. Nor was any particular clause in the constitution, conferring any privilege or exemption, in any manner whatever alluded to in the record, or can be supposed, by any reasonable intendment, to have been drawn in question; *except, perhaps, the fifth amendment, which, as it has been already shown, does not apply to the states, whatever may [*584 be its construction. Nor can the prohibition to the states to enter into any treaty, alliance or confederacy, or into any agreement or compact, with another state, or with a foreign power, be considered as drawn in question or violated. There is nothing in this record to warrant an inference, that the state of Vermont had ever entered into any agreement or compact with Canada, in relation to the surrender of fugitives from justice. The governor of Vermont does not profess to act under any such agreement; and it is inconceivable, if any existed, why no allusion whatever is made to it in his warrant, or in the proceedings before the court. The record, in my judgment, does not furnish the least evidence, justifying a conclusion that any treaty, compact or agreement of any description, had been entered into between the state of Vermont and Canada, on the subject of surrendering fugitives from justice; and the case now before the court is the only one, from anything appearing on the record, where it has ever been attempted. And to construe this single isolated case, and that, too, by the governor alone, without any evidence of his acting under the authority of any statute of the state on the subject, to be an entering into a solemn compact or agreement between the state of Vermont and a foreign power, in violation of the article of the constitution, which prohibits a state from entering into any compact or agreement with a foreign power; is a construction to which I cannot yield my assent.

I am not, therefore, able to discover how any question could have arisen, and been decided in the supreme court of Vermont, coming within the appellate power of this court. This power is not only affirmatively declared and pointed to certain specified cases; but there is an express denial of the authority of this court to go beyond such specific questions. The act declares, that no other error shall be assigned or regarded as a ground of reversal, than such as appears on the face of the record, and immediately respects the before-mentioned questions of the validity or construction of the constitution, treaties, statutes, commission or authority in dispute.

And it appears to me to be a very strong and cogent objection to taking jurisdiction in this case, that a reversal of the judgment will be entirely unavailing, unless the supreme court of Vermont shall voluntarily discharge the prisoner. It is certainly not in the power of this court to enforce its judgment. If the jurisdiction of this court was clearly and plainly given, it might not be a satisfactory answer, that it could not execute its judgment. But where the authority of this court depends upon a doubtful construction of its appellate power, it furnishes a persuasive reason against applying the power to a case which may result in a nugatory and fruitless judgment. It is not to be presumed, that congress would vest in this court a power to

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judge and decide, and withhold from it the authority to execute such judgment. It would be of no benefit to the party, and would be placing the court in no very enviable a *situation. If the proceeding on a *habeas* *585] *corpus* is a suit in the meaning of the judiciary act, an execution of the judgment is the fruit and end of the suit, and is very aptly called the end of the law. And the provisions contained in this 25th section of the judiciary act, show very satisfactorily, in my judgment, that the revising power of this court was not intended to be applied to any case where the could not execute its judgment. The act declares, that the writ of error shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court. And the proceedings upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision, as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. This looks to a case where the state court refuses to execute the judgment of this court. No such provision is made or allowed, when the writ of error is to a circuit court of the United States. In such case, the judiciary act declares, that the supreme court, shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereon. And what is the reason for this different mode of executing the judgment of this court. It is because this court can coerce the circuit courts to execute the mandate. The judiciary act gives to the supreme court the power to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States; and that the courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

But no such coercive power is given over a state court; and hence the necessity of authorizing this court to execute its own judgment. If the supreme court of Vermont shall refuse to execute the judgment of this court, requiring the discharge of the prisoner Holmes, can this court in any way enforce its judgment? If it can be done at all, it must be by sending a *habeas corpus* to the sheriff or jailer, having the custody of the prisoner, to bring him here to be discharged. And if that officer shall return that he holds him under a commitment of the supreme court of Vermont, what can this court do? We must remand him; and there ends our jurisdiction.

The judiciary act authorizes this court to issue writs of *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; with a proviso, however, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, *586] or are *committed for trial before some court of the same, or are necessary to be brought into court to testify (§ 14). The power, therefore, of this court to execute its judgment is expressly taken away; and the prisoner obtains no relief. And can it be reasonably supposed, that congress intended by this 25th section of the judiciary act, to embrace cases where

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the judgment must be a dead letter, and at most merely advisory, and the expression of an opinion upon an abstract question, but utterly fruitless, if the advice shall be disregarded. I cannot yield my assent to the assumption of a power which must place this court in such a feeble, an inefficient situation. If this court has the power to meet the exigency of the case at all, why not apply at once the appropriate and efficient remedy by *habeas corpus*; and relieve the prisoner from his illegal imprisonment. But if this power is denied to the court, can it be, that the act of congress has clothed us only with the naked authority to advise the supreme court of Vermont to discharge the prisoner? I think not. And that it is, therefore, a case not embraced under the 25th section of the judiciary act; and that the appellate power of this court cannot reach the case.

BALDWIN, Justice.—Concurring most fully and cordially in the opinions delivered by those of my brethren, who are opposed to any action by this court, on this case, I have nothing to add to the reasons assigned by them, respectively, lest it might imply my want of confidence in the grounds which they have taken; and, in my mind, maintained with conclusive force. There are, however, two subjects of high consideration involved in this case, which I feel constrained to notice; as my opinion would have been governed by them, had there been no other grounds for my declining to interfere with the order of the supreme court of Vermont, remanding the relator to the custody whence he was brought before them by the writ of *habeas corpus*. 1. The constitution of the United States confers no power on any department of the federal government, to prevent a state or its officers from sending out of its territory a person in the situation of Holmes, the relator. 2. That a writ of error does lie from this to a state court, to revise their proceedings on a writ of *habeas corpus*.

That the treaty-making power of the constitution is competent to bind the states, by a stipulation to surrender fugitives from justice, is not denied by any; nor that where such power is executed by a treaty, a state is under an obligation to surrender; but that while such power remains dormant or contingent, the obligation does not exist, and that congress have no power to impose it, has been too clearly established by my brethren, to leave it in my power to add to the weight of their reasoning. But while I admit the competency of the treaty-making power to compel, I utterly deny its power to prevent the expulsion of a fugitive from justice from the territory of a state, pursuant to its laws, or the general authority vested in its executive or other appropriate officers, to administer and enforce its regulations of internal police. This distinction between the power to compel, and the power to prevent the surrender of a fugitive, is visible in the whole frame of the constitution, as well in the general lines which it designates, in separating the powers of the federal and state governments, by grants, prohibitions and separations, as by its more specific provisions.

There cannot be found a clause in the whole instrument, which, in terms, or by any fair construction, can be made to bring the power to compel a state not to surrender, within any enumerated subject over which congress can legislate; unless it is sought as one of a vagrant nature, to be exercised under such of the various items specified, as may be suggested by a train of ingenious, refined and subtle reasoning, from one implication to another, till

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there is found some hook whereby to connect this with some granted power. Nay, it is cautiously omitted in the prohibition on the states, to use any language, which can be tortured into a reference to the subject-matter; and as the nature of the treaty-making power precludes any enumeration of the subjects of its exercise, it is left with no other prescribed limitation, than, that treaties, to have their constitutional effect, must be made "under the authority of the United States." This power must then be called into action, and act on the subject, before a state can be deprived of the right to surrender, or retain a fugitive, at its pleasure; a right which each state possessed in its plenitude, on the dissolution of the articles of confederacy, and which remained unimpaired, till it became party to the constitution, on its adoption by the people thereof, whereby they held the power subject to such restraints, as treaty stipulations might impose in future. Without such stipulation, the whole subject-matter of fugitives of any description, from a foreign nation, or any of its colonies or dependencies, is reserved to the respective states, as fully as before the constitution; but with such stipulation in a treaty, I admit, the state is as much bound to make the surrender, as if it had been a subject of express delegation of power to the president and senate; or as if the same provision had been made in relation to foreign fugitives from justice or service, as those from the respective states, but which is guardedly omitted.

In the second clause of the second section of the fourth article, the constitution provides, that "a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state from which he fled." A corresponding provision is made for fugitives from service or labor; and congress, by the act of 1793, have prescribed the mode in which the provision of the constitution shall be carried into effect. (1 U. S. Stat. 302.) It will not be pretended, that these provisions do not impose upon the states of this Union, an obligation as imperative, and impair their reserved rights to the same extent, as a similar stipulation in a treaty between the United States and any foreign state; let it then be assumed, that there was such a treaty with Great Britain, in relation to fugitives from justice in Canada (and a stronger case cannot be supposed); the question it involves is not difficult of solution.

The object and great purpose of the constitution and congress, in one case, and of the treaty in the other, is to make it the duty of the state and its officers, to make the surrender, on a demand; but it does not follow, that it may not be done voluntarily, or without demand; to take the fugitive to the border and force him to pass the line, whether the authorities of the adjacent states or provinces are desirous, or even willing to receive him or not, is but an ordinary police power. This is the true point in issue; whether a state is prohibited by the constitution, from doing, of its own accord, an act which it is bound to do, whenever demanded pursuant to a law or a treaty of the United States; and which it might do or refuse, if the subject was neither within the law nor treaty-making power of the United States. Had no provision been made for the reclamation of fugitives from the states, there could be no pretence for denying to the states an unlimited discretion over the whole subject; the constitution has put one single limitation on this dis-

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cretion, in case of a demand from the executive of another state; leaving that discretion as free and full, where no demand is made, as if the constitution had been wholly silent on the subject. And if it had been so silent, the only difference would have been, that though there would have been no obligation to surrender, on a demand, there would have been the same right and power to do it, as now exists in each state, in respect to their respective fugitives; or as would exist under a treaty-making provision for the reciprocal delivery of fugitives from the Canadas, or the states.

No injunction of the constitution can be violated, nor the faith of treaties impaired, by each state or province refusing to be made a Botany Bay, an asylum or even the receptacle of the vagabonds, the criminals or convicts of the other; any duty of state to state, of state to the Union, and the United States to foreign powers, is fully and faithfully executed by the performance of the duties and stipulations imposed or made. But no political community, no municipal corporation, can be under any obligation to suffer a moral pestilence to pollute its air, or contagion, of the most corrupting and demoralizing influence, to spread among its citizens, by the conduct and example of men, who, having forfeited the protection of their own government by their crimes, claim to be rescued from the consequences, by an appeal to the same constitution and laws, under which our own citizens are not, and cannot be screened from punishment, when it is merited by their conduct. No state can be compelled to admit, retain or support foreign paupers, or those from another state; they may be removed, or sent where they came; not because poverty is a crime, but because it is a misfortune not to be mitigated or relieved by the compulsory contributions of those among whom they throw themselves, or are cast by their governments for maintenance.

Every state has acknowledged power to pass and enforce quarantine, health and inspection laws, to prevent the introduction of disease, pestilence or unwholesome provisions; such laws interfere with no powers of congress or treaty stipulations; they relate to internal police, and are subjects of domestic regulation within each state, over which no authority can be exercised by any power, under the constitution, save by requiring the consent of congress to the imposition of duties on exports and imports, and their payment into the treasury of the United States. 11 Pet. 102, 130, &c.; 9 Wheat. 203, &c.; 12 Ibid. 436, &c. See § 10, art. 1, cl. 2. "These laws form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government," &c.; 9 Wheat. 203. "No direct general power over these subjects is ganted to congress, and consequently, they remain subject to state legislation. Ibid. "The constitutionality of such laws has never, so far as we have been informed, been denied" (Ibid. 205), and are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens." Ibid. "The power to direct the removal of gunpowder, is a branch of the police power, which unquestionably remains with the states." 12 Wheat. 443. "We are not sure, that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles, is undoubtedly an exercise of that power; and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state." Ibid. 444.

These principles were re-affirmed in the *City of New York v. Miln*, in

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language worthy of repetition, and most appropriate to this case in all its bearings. "That the state of New York possessed power to pass this law (respecting foreign paupers), before the adoption of the constitution of the United States, might probably be taken as a truism, without the necessity of proof. But as it may tend to present it in a clearer point of view, we will quote a few passages from a standard writer upon public law, showing the origin and character of this power." Vattel, book 2, ch. 7, § 84. "The sovereign may forbid the entrance of his territory, either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state." Ibid. book 2, ch. 8, § 100. "Since the lord of the territory, may, whenever he thinks proper, forbid its being entered; he has, no doubt, a power to annex what conditions he pleases, to the permission to enter." "The power then of New York to pass this law, having undeniably existed at the formation of the constitution, the simple inquiry is, whether by that instrument it was taken from the state, and granted to congress; for if it were not, it yet remains with them." "If, as we think, it be a regulation, not of commerce, but of police; then it is not taken from the states. To decide this, let us examine its purpose, the end to be attained, and the means of its attainment." "It is apparent, from the whole scope of the law, that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states; and for that purpose, a report was required of the names, places of birth, &c., of all passengers; that the necessary steps might be taken by the city authorities, to prevent them from becoming chargeable as paupers." "The power reserved to the several states, will extend to all the objects which, in the ordinary course of affairs, concern the liberties, lives and properties of the people; and the internal order, improvements and prosperity of the state." 11 Pet. 132-3.

After a review of *Gibbons v. Ogden*, and *Brown v. Maryland*; and showing that their opinion is not in collision with the principles of either of those cases, the court say: "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider an impregnable position. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people; and to provide for its general welfare, by any and every act of legislation which it may deem conducive to these ends; where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal regulations, or what may, perhaps, more properly be called 'internal police,' are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive." 11 Pet. 139. "We think it as competent, and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported;

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or from a ship, the crew of which may be laboring under an infectious disease." Ibid. 143.

These principles were not declared for the first time in the case of *Miln*; they flowed from those which were established as unquestionable in the *United States v. Bevans*, where this language is used: "What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts; unless that jurisdiction has been ceded to the United States (3 Wheat. 386-7) by a cession of territory; or which is essentially the same, of general jurisdiction." Ibid. 388. "It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction, have divested Massachusetts of the power to regulate the trade of her bay?" Ibid. 389.

It would be, at least, superfluous, if not presumptuous, in me, to attempt to illustrate or enforce the soundness of these principles, which this court declare to be impregnable positions, on which they plant their opinion. That they may neither be shaken nor impaired by any future collision between them, and any opinions which may be founded on a contrary construction of the constitution, is most ardently to be desired, by all who wish to see the federal and state governments move within their respective orbits, with the same harmony, for the future, as they have done for the past. The continuance of this harmony, will, in my opinion, be in imminent danger, not only of interruption, but of extinction, whenever the course of this court shall be such, as to subvert the great principles of constitutional jurisprudence, on which it has defined the line of separation between the powers which are granted to the United States, and those prohibited or reserved to the states, or the people thereof, respectively. Nor is there one among these latter powers, which it is so dangerous to attempt to impair, as that of internal police; and especially, that portion of it which relates to fugitives, vagabonds, criminals or convicts, whether they have fled from justice before or after trial: for if a state cannot expel from her territory this species of pestilence, so infectious, contagious and fatal to the morals of the community, in which they are suffered to mix and move unmolested, her power of police is a shadow, a farce, while this most feculent mass of corruption remain a public nuisance, which the power of a state is incompetent to abate.

It is but a poor and meagre remnant of the once sovereign power of the states, a miserable shred and patch of independence, which the constitution has not taken from them, if, in the regulation of its internal police, state sovereignty has become so shorn of authority, as to be competent only to

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exclude paupers, who may be a burden on the pockets of its citizens ; unsound, infectious articles, or diseases, which may affect their bodily health ; and utterly powerless to exclude those moral ulcers on the body political, which corrupts its vitals, and demoralize its members. If there is any one subject on which this court should abstain from any course of reasoning, tending to expand the granted powers of the constitution, so as to bring internal police within the law or treaty-making power of the United States, by including it within the prohibition on the states, it is the one now before us. Nay, if such construction is not unavoidable, it ought not to be given ; lest we introduce into the constitution a more vital and pestilential disease than any principle on which the relator could be rescued from the police power of Vermont, would fasten on its institutions, dangerous as it might be, or injurious its effects. Should an adjudication, so fearful in its consequences, be made in a case of a kindred nature with this, the people and states of this Union will "plant themselves" on the "impregnable positions," taken in the opinions of this court, in the cases quoted ; and standing on grounds thus consecrated, refuse to surrender those rights which we had declared to be "complete, unqualified and exclusive."

The power of this court is moral, not physical ; it operates by its influence, by public confidence in the soundness and uniformity of the principles on which it acts ; not by its mere authority as a tribunal, from which there is no appeal ; and if ever its solemn decisions should be overlooked by itself, or we should cease to respect those of our predecessors, the people and the states will still adhere to them ; and our successors will refuse to follow our deviations from the ancient path. It may be the doctrine of the day, that the reserved rights of the states are too broad, and the powers of congress too narrow ; but it will not withstand the scrutiny of time, or the deliberate consideration of the principles on which the cases referred to have been decided, and those therein promulgated. If they shall ever be disregarded in public opinion, and their reversal follow ; it will not be done by the establishment of those principles on which it is now attempted to enlarge the prohibitions on the states, and to expand the powers of congress, by implication upon implication, to effect both objects by ingenious or far-fetched suppositions or assumptions. Ingenuity, talents and subtlety can work a countermines under the constitution, by which the contrary effect may be produced ; whereby the reserved powers of the states may absorb as much of the granted powers of the general government, as the adoption of the grounds on which the relator's case has been placed would take from those which have neither been granted by, nor prohibited to the states. Equally dreading and avoiding both extremes, I am content to take the constitution as it has hitherto been expounded by this court, on all subjects connected with the cause now before us ; in my opinion, it leaves no open point, even admitting what is known not to exist, that there was a treaty stipulation on the subject. But without such stipulation, the relator's case is most bald and barren of merits, it rests upon doctrines not to be sanctioned consistently with past adjudications, which, in the *United States v. Bevans*, asserted the jurisdiction and legislative power of a state to be co-extensive with its territory, over all subjects not delegated to the general government ; and in *Gibbons v. Ogden*, *Brown v. Maryland*, and *New York v. Miln*, declared, that no power over the internal police of a state

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had been so delegated by the constitution ; but was reserved exclusively to the states. I deem it wholly unnecessary to make a detailed application of those cases to the present ; their affinity is too visible, on a comparison, to require anything more than a reference to them, respectively, as they are reported ; police is in every feature ; the moral and physical health of the people is the common object of police regulations in all their ramifications, as applied to the vast variety of subjects which they embrace, and none of which are confided to any other than state power ; and all of which must remain under its exclusive control, till the constitution is changed.

The states are enjoined by the constitution, to surrender a fugitive from another state, on a demand ; they will be obliged to do it, under a treaty stipulation, to a foreign power ; and thus far, but no farther, has there been, or can be, any abridgment of their power over the subject : they cannot be deprived of their right of expelling from their territory those fugitives who have no privileges within it ; or be compelled to retain them, when they are not entitled to the protection of its constitution or laws. Any refugee crosses the border at his peril ; his government may not desire to reclaim him for punishment, and be unwilling to receive him again ; but that matters not to the state to which he flies ; the right and power to remove, expel and voluntarily to surrender the fugitive, is as perfect as if it was a duty prescribed by a power paramount to that of the state.

This is, in my opinion, the turning point of this case ; and this right to determine what persons fleeing from abroad shall be suffered to remain a burden on its citizens for their support, or a dangerous example to the community, is so peculiarly and appropriately a subject of state jurisdiction, as to be incapable of delegation to any other power. Any action of congress upon it, would be not only an assumption of ungranted power, but a direct usurpation of powers reserved to the states ; and if exercised by means of coercion, to compel a state to retain the vagabonds from other states, or the border provinces, would operate more fatally on the morals of the people, than pestilence upon their health, or gunpowder on their property and their lives. Happily, such power is not visible in the constitution ; nor has it been infused into it by construction ; whenever internal police is the object, the power is excepted from every grant, and reserved to the states, in whom it remains, in as full and unimpaired sovereignty, as their soil, which has not been granted to individuals or ceded to the United States ; as a right of jurisdiction of the land and waters of a state, it adheres to both, so as to be impracticable of exercise by any other power, without cession or usurpation. Such is the power which the governor, as chief magistrate of Vermont, has exercised over this fugitive ; in my opinion, it was properly exercised ; and that no department of this government is competent, on subjects of police, to control him, or any other state officer, in the execution of his or their offices.

By the course which has been taken, all danger of interfering with the relations of the United States and foreign powers, either in matters of commercial intercourse, or diplomatic concern, is avoided ; such interference could happen only on the refusal to deliver up the fugitive, on the demand or request of the authorities of Canada ; for a compliance with either, would rather add strength to, than tend to weaken, the pre-existing relations of amity and comity between the two nations. On the other hand, if the

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delivery was spontaneous, and made in the true spirit of border peace, and mutual safety from crime, the boon would be the more acceptable ; or if the authorities of the state should send the fugitive back whence he came, those of Canada would have no cause of complaint, because they had made no reclamation, or because Vermont was unwilling to incorporate among its citizens a foreigner whom his own government was disposed not to take back. The United States cannot complain, for neither their rights nor power can be affected, unless some department of their government shall put itself in the place of Vermont, to determine on what subject its internal system of police shall operate, and how it shall be executed ; but on any other ground or pretext, there can be no colorable argument or reason for such interference. That the case before us is one in any way affecting our foreign relations, seems to me wholly supposititious ; and the untoward consequences which seem to be apprehended from affirming the exercise of the power of the governor, appear as wholly conjectural, and without any rational foundation in fact or principle. But be this as it may, we have no warrant from the constitution, and congress can give us none, to authorize us to interfere with the exercise of a power, which comes within every definition which this court has given of a regulation of the internal police of a state ; or to examine whether it has been exerted under the authority of a state law, or by the constitutional power of its chief executive magistrate. It suffices for all the purposes of this case, that the subject-matter is not of federal cognisance ; but is excluded from the jurisdiction of the United States, to its full extent, and reserved for the action of another sovereignty, whose power over it must remain untouched, till an amendment to the constitution shall displace it. That this may never be done is, in my opinion, devoutly to be wished by every friend to the permanency of our institutions.

The other ground on which I am opposed to any interference with the proceeding of the supreme court of Vermont in this matter is, that it is not within the appellate jurisdiction of this court, under the 25th section of the judiciary act ; because the order of that court on a *habeas corpus*, is not a judgment on which a writ of error can be brought. I cannot so well define the nature and object of the writ of *habeas corpus*, or so well explain the proceedings upon it, as in the language of this court : " It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned, is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried ; and therefore, these questions are separated and may be decided in different courts. The decision that the individual shall be imprisoned, must always precede the application for a writ of *habeas corpus* ; and this writ must always be for the purpose of revising that decision, and therefore, appellate in its nature." 4 Cranch 101. " This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial ; and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail. If, &c., upon inquiry, it manifestly appears, that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in

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such cases only is it lawful totally to discharge him, otherwise he must either be committed to prison, or give bail." Ibid. 125-6. "The judiciary act (§ 14) authorizes this court, and all the courts of the United States, and the judges thereof, to issue the writ, for the purpose of inquiring into the cause of commitment." 3 Pet. 201. "It is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." "It is in the nature of a writ of error, to examine the legality of the commitment." Ibid. 202. It lies to a circuit court of the United States, sitting in a state (3 Dall. 17), or to the circuit court of this district (3 Cranch 448; 4 Ibid. 101); it is an exercise of appellate jurisdiction, and "we are but revising the effect of their process, &c., under which the prisoner is detained." 7 Pet. 573. But it does not lie in favor of persons committed for treason or felony, plainly expressed in the warrant, convicted a contempt (9 Wheat. 39), or of a crime, by a court of competent jurisdiction (3 Pet. 202, 208), or persons in execution (Ibid.), nor will the court, upon the writ, look beyond the judgment, and re-examine the charges on which it was rendered (Ibid. 202); for if this court cannot directly revise the judgment of a circuit court in a criminal case, they cannot do it indirectly. Ibid. 208. The power to issue this writ being concurrent in this court, the circuit, and district courts, and every judge of either, the action upon the writ, when the party is before a court or judge, is directed to the same object, "for the purpose of inquiring into the cause of commitment," in order to ascertain whether he shall be remanded to prison, discharged on bail, or without bail; in doing which, this court has no more power than any district judge; the nature of the power and the rules by which it must be exercised, are the same. 4 Cranch 96.

This court has declared this power to be appellate, and not original; so I shall take it, on its authority, though, if the point was new, it would seem to me to be the exercise of a special authority given by the judiciary act, for the specific purpose therein set forth; and that from the very nature of a high prerogative writ, it must be issued, and acted upon by prerogative, and not appellate power; especially by the courts of the United States, whose jurisdiction is special, and limited to the cases specified in the constitution and judiciary act. Taking, however, the power to issue the writ, and the action upon it to be appellate, then every district judge can exercise it to the same extent that this or a circuit court can; consequently, he can revise the process of either court, by which a person has been committed, by inquiring into the cause of commitment, and proceeding thereupon, in the same manner as if the commitment had been by a justice of the peace. This inquiry is confined to the question of re-commitment or discharge, the result of which depends on the discretion of the judge or court before whom the prisoner is brought; the warrant of commitment must be inspected, to see whether it sets out a proper cause for imprisonment; the evidence is examined for probable cause of prosecution; and if the warrant and evidence are sufficient, then the question of bail, and its amount, necessarily arises, which is, confessedly, a matter purely discretionary, subject only to the provision of the eighth amendment to the constitution, the 33d section of judiciary act (1 U. S. Stat. 91), and the fourth section of the act of 1793. (Ibid. 334.)

On this view of the nature and object of the writ of *habeas corpus*,

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with the proceeding upon it, considered as the exercise of appellate jurisdiction, the first inquiry is, whether the manner in which it has been exercised, can be revised by a writ of error to any court or judge of the United States. That a writ of error will not lie upon any proceeding before a judge of this court, or a district judge, in vacation, is too clear for discussion; there is no court, no record to remove, no judgment to revise, the judge acts by a summary order, which affects only the question of imprisonment, discharge or bail; the very nature of such action, by an appellate power, by a judge out of court, precludes its revision by another appellate power; which can act only by a writ of error, directed to a court of record, to remove their final judgment and proceedings in the case. This court cannot issue a writ of error to a district court, in any case where a special authority to do it is not expressly given by law; nor to a circuit court, unless by the provision of the judiciary act (7 Cranch 108, 287; 2 Wheat. 259, 395; 6 Pet. 495-6; 12 Ibid. 143; 13 Ibid. 290); nor can the circuit court issue a writ of error to a district court, in any other than the specified cases provided for; "nor issue compulsory processes to remove a cause before final judgment." Such process (as a *certiorari*) is void, and may be disregarded (2 Wheat. 225-6) as a nullity.

By the 22d section of the judiciary act, final judgments and decrees, in civil actions in the district courts, may be re-examined in the circuit courts, on a writ of error; whereby the power of the circuit court rests on two things; the judgment must be final, and must be rendered in a civil action, neither of which can exist in a *habeas corpus* issued under the 14th section, which gives authority to issue and act upon this writ, in two classes of cases. 1. To all the courts of the United States, where it is necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. 2. To either of the justices of the supreme court, as well as judges of the district court, "for the purpose of an inquiry into the cause of commitment:" provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail; unless they are in custody under the authority of the United States, committed for trial before some court of the same, or to testify, &c. (1 U. S. Stat. 82.)

On a full consideration of this section, this court, in the case of *Bollman and Swartwout*, held, that it applied to the great writ of *habeas corpus ad subjiciendum*, providing the "means by which this great constitutional privilege should receive life and activity," that the generic term *habeas corpus*, when used singly and without additions, means the great writ now applied for; "and in that sense, it is used in the constitution." 4 Cranch 94-100. It was also held, that it did not apply to a *habeas corpus ad respondendum*, to process from a state court, to a *habeas corpus cum causa*, or the mode of bringing causes into a court of the United States, from a state court (Ibid. 96, 98); consequently, this great writ issues only in cases where a party is imprisoned on the charge of some criminal offence against the United States; and not in a civil action, to which they may be a party, as is apparent from the view taken by the court in connecting the 33d and 34th sections.

The 33d section directs, that, "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases, it shall not be admitted, but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court; who shall

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exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law " (1 U. S. Stat. 91) ; on which the court remark : " The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for ; of consequence, a court possessing the power to bail prisoners not committed by itself, may award a writ of *habeas corpus* for the exercise of that power ; and the 33d section was held to be explanatory of the 14th. 4 Cranch 99-100.

Hence, there are, in my opinion, three objections to a writ of error from a circuit to a district court, to revise their proceedings on a writ of *habeas corpus ad subjiciendum* : 1. It is not a civil action. 2. The order to re-commit, to bail, or discharge is not a final judgment or decree. 3. The action of the court is discretionary, depending on the nature of the case, the evidence, and the usages of law. These objections apply with greater force to a writ of error from this to a circuit court, under the 22d section, which provides, that " upon a like process, may final judgments and decrees in civil actions, and suits in equity, in a circuit court, brought there by original process, or removed there from courts of the several states, or removed there by appeal from a district court, be re-examined in the supreme court. Independent then of the three objections above mentioned, others arise from the additional provisions in relation to the writ of error from the supreme court. It lies only from a final judgment, in a civil action, &c., brought in a circuit court by original process, or removed there from a state or district court ; consequently, it lies not upon a proceeding on a *habeas corpus* ; which is the exercise of appellate power, commencing on petition, affidavit, and motion for the writ, and terminating by an order which the court makes according to its discretion. This order, from its nature and effect, is not and cannot be final ; for it only discharges the party from any further confinement, under the process under which he was arrested, " but not from any other process which may be issued against him, under the same indictment." 9 Pet. 710. The inquiry being merely preliminary to a trial, the order is only interlocutory, and can extend no further than to the specific subjects of the inquiry, which can have no bearing on the final result of the prosecution as to guilt or innocence.

By using the term " original process," the law excludes that which is appellate ; it relates to the writ, by which a plaintiff brings a defendant into the circuit court, to answer a demand made in a civil action for a debt or damages ; but surely not to a writ issued for persons in confinement under a criminal charge, directed to the officer or person who has him in custody under the authority of the United States, the object of which is to procure the liberation of the prisoner. The same conclusion results from the reference of civil actions in the circuit court, " removed there from courts of the several states ;" these actions are described in the 12th section, which prescribes the mode of removal, and declares that when removed, " the cause shall proceed in the same manner, as if it had been brought there by original process." So, as to civil actions removed there by appeal from a district court, which are defined in the 21st section, and confined to final decrees " in causes of admiralty and maritime jurisdiction ;" whence it follows, that the proceeding of the circuit court on a writ of *habeas corpus*, cannot be comprehended within either of the three classes of cases, to which a writ

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of error is confined by the terms of the 22nd section of the judiciary act.

The provisions of the 23d and 24th sections lead to the same conclusion, by pointing only to those cases in which an execution can issue, or be superseded by the writ of error, and where, upon affirmance, the court may decree just damages to the respondent in error for his delay, and single or double costs, at their discretion; and by directing the mode of proceeding by the supreme court, on affirming or reversing, and sending a special mandate to the circuit court, to award execution thereupon (1 U. S. Stat. 85), which will be hereafter considered in connection with the 25th. An application of these provisions to a writ of error on a writ of *habeas corpus*, makes it manifest, that the law contemplated no such case; no execution issues, the order for recommitment or to give bail, or for a discharge, cannot be superseded; no damages can accrue by delay, and no mandate for execution can be awarded, for no final judgment exists on which an execution could issue. Had it been intended to embrace a *habeas corpus*, some provision appropriate to the case would have been made; its entire omission affords the most conclusive evidence to the contrary; or if anything is wanting to remove all doubt, it will be found in the nature and object of this great writ, this constitutional privilege. It was designed to afford a speedy remedy to a party unjustly accused of a crime, without obstructing or delaying public justice; both of which objects would be defeated, by the delays consequent upon a writ of error, as it may be taken out by either party; if it can be by one, the court can make no distinction between them, as it is a writ of right. See 7 Wheat. 42. For these reasons, I am fully convinced, that no writ of error can be issued by this, or a circuit court, under the authority of the judiciary act, to revise a proceeding on a writ of *habeas corpus*, by any judge or court of the United States: the next inquiry is, whether it can issue on a similar proceeding in a state court.

By the 25th section it is provided, "that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision of the suit could be had," &c. (enumerating the particular classes of cases), "may be re-examined, and reversed or affirmed, in the supreme court of the United States, upon a writ of error," &c., "in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court; and the proceeding upon the reversal shall be the same, except, that the supreme court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause has once been remanded before, proceed to a final decision of the same, and award execution. 1 U. S. Stat. 86; 1 Wheat. 353. This section differs from the 22d, only in using the term "any suit," in place of "civil actions," the effect of which is, that the writ of error lies to remove an indictment from a state court, as held in *Cohens v. Virginia*, 6 Wheat. 390-1, 407, 410, &c., and to a prohibition, in *Weston v. City of Charleston*, 2 Pet. 463-4, but the nature of the judgment to be re-examined is the same—it must be a final one. The 23d section applies to the writ of error to a state court, in all respects as to a circuit court. So does the 24th, unless so far as its provisions come within the exception of the 25th, which it becomes necessary to consider. The 24th section directs, that when a judgment or decree of the circuit court

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shall be reversed by the supreme court, it shall proceed to render such judgment, or pass such decree, as the circuit court should have rendered or passed; except when the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the supreme court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon." Connecting this section with the exception in the 25th, we have the precise case provided for in the latter; "where the damages to be assessed" (in a suit at law), "or the matter to be decreed" (in a suit in equity) "are uncertain;" then the supreme court may "proceed to a final decision, and award execution," if the cause had been before remanded. Now, it is most evident, that neither the exception in the 24th or 25th section, can apply to a proceeding on the writ of *habeas corpus*, for two conclusive reasons: 1. That if the reversal is in favor of the petitioner or plaintiff in this writ, there are no damages to be assessed, nor any matter to be decreed which is uncertain; the judgment to be rendered is certain, and can be none other, than for the discharge of the prisoner, on, or without, bail; and is not, nor can be a final decision of the cause. 2. The original suit is on the warrant of commitment, and a decision which precedes the application for the writ of *habeas corpus*, the issuing of which, and the proceeding upon it are, as has been held uniformly by this court, the exercise of appellate jurisdiction and power. A third reason is equally apparent in both sections, the final judgment must have been one, on which an execution could be awarded by the circuit court, on a special mandate from this, under the 24th; or by this court, in a case coming within the exception of the 25th; and in either case, there must have been a final decision of the cause, before any execution could be awarded. The terms "original suit," and "cause," are used in the same sense, in the 24th section, so in the 25th; "suit" and "the cause" mean the same thing, both terms referring to the final action of this court, whether they "remand the cause for a final decision," by the circuit court, and send them a special mandate to award execution under the 24th; or themselves "proceed to a final decision of the same (the cause) and award execution," under the 25th section.

These considerations bring this inquiry to a narrow space, presenting to my mind stronger objections to the jurisdiction of this court over the present case, than would apply to a writ of error to a court of the United States; while all the reasons which apply in the latter case, operate with full force on this; unless some distinction can be found between the terms "civil actions," and "any suit," or "the cause," in which a final judgment has been rendered, which will justify a writ of error to a state court, in a case where it would not lie to a court of the United States, by reason of its not being a final decision or judgment; or on any other ground than that it was not a civil action. The only distinction between the two classes of cases consists singly in this; that the term "any suit," in the 25th section, is broader than the term "civil actions," &c., in the 22d; whereby criminal cases may be revised by this court, on a writ of error to a state court; though they are excluded from the appellate jurisdiction of this over circuit courts; unless they are certified by a circuit court, on a division of opinion between the judges thereof, under the sixth section of the act of 1802 (2 U. S.

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Stat. 159), if such action as is therein prescribed, can be called the exercise of appellate power, and not a mere special statutory authority.

In following to its consequences the settled principle of this court, that in issuing and acting upon a writ of *habeas corpus*, under the 14th section, it is by appellate power, it will appear, that the reasons for so considering this power are most conclusive against the exercise of their appellate jurisdiction over writs of error to the proceedings of a state or circuit court, on such a writ issued by either. In defining appellate power in such cases, the court say : "It is the revision of a decision of an inferior court, by which a citizen has been committed to jail ;" the question on a *habeas corpus* "is always distinct from that which is involved in the cause itself (4 Cranch 100) ; these questions are separated, and may be decided by different courts." "The decision that the individual shall be imprisoned must always precede the application for the writ of *habeas corpus* ; and this writ must always be for the purpose of revising that decision ; and therefore, appellate in its nature." Ibid. 101. The case on a *habeas corpus* is "a mere inquiry, &c., whether the accused shall be discharged or held to bail." Ibid. 125. The law which gives authority to issue the writ, defines its object, "for the purpose of inquiring into the cause of commitment" (3 Pet. 201) ; "its legality, and the sufficiency of that cause." Ibid. 202. "Considering then, as we do, that we are but revising the effect of the process awarded by the circuit court, under which the prisoner is detained, we cannot say, that it is the exercise of an original jurisdiction." A discharge under this writ, discharges the party only from such process, and not "from any other process under the same indictment" (9 Pet. 710), or a new one. 4 Cranch 136.

Let, then, whatever term, action, case, cause, suit, be given to a writ of *habeas corpus*, and the proceedings upon it ; let the final action of the court upon it be called a decision, an award, a judgment or order, the character or nature of either, and the effects are the same ; nothing is revised but the process or arrest, and the decision on which the process issued, and the arrest is made ; the inquiry is limited to the cause of commitment ; and every question arising is always so distinct from "the cause itself," that this inquiry can be determined by one court, and the cause by another. There can, then, be no final decision of "any suit," the "original suit," or "the cause," on a writ of *habeas corpus*, the subject-matter in controversy remains unaffected by the mere inquiry into the cause of commitment, its sufficiency, or the legality of the process, as fully as if no *habeas corpus* had been issued ; any judgment rendered by any court affects only the process ; nor can it be in any sense deemed a "final judgment in a suit," on "the cause itself," or "a final decision of the same," so as to make it cognisable in this court, by any appellate jurisdiction, on a writ of error to a circuit court, under the 22d, or a state court, under the 25th section of the judiciary act.

Another objection equally fatal to the writ of error in this case is, that though the awarding the writ of *habeas corpus* is a matter of right, and "is granted *ex debito justitiæ*," yet the action of the court is governed by its sound discretion, exercised on the whole circumstances of the case, according to which "the relief is allowed or refused on a motion." But a rule or order, denying the motion, is not a judgment, "is only a decision on a collateral or interlocutory point, which has never been deemed the foundation of a writ of error," which lies "only upon a final judgment or deter-

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mination of a cause." "A very strong case illustrating the doctrine is, that error will not lie to the refusal of a court to grant a peremptory *mandamus*," &c., as held by the house of lords. See 6 Pet. 656-7, and cases cited; 9 Pet. 4, 6. No principle is, or can be better settled by this court, than that no writ of error lies upon any proceeding in a case, depending on the discretion of the court. 1 Pet. 168; 6 Ibid. 217, 656; 7 Ibid. 149; 13 Ibid. 15. There can be no case more peculiarly and exclusively of that description, that one involving only the question of discharge, or recommitment on a *habeas corpus*; which is declared to be "the appropriate process" for that purpose. 4 Cranch 100. "A mere inquiry, without deciding upon guilt" (Ibid. 125), "always distinct from the question, whether he shall be convicted or acquitted" (Ibid. 101), and directed only to process (7 Pet. 573; 9 Ibid. 710), not to the final determination of the cause (6 Ibid. 657), but to a decision on a mere interlocutory collateral point, cautiously excluded from revision on error by the judiciary act.

The same result is found in "the principles and usages of (the common) law," as laid down in the time of Coke, without a single deviation to this time. In 8 Co. 127 *b*, 128 *a*, it was declared, that no writ of error could lie upon a *habeas corpus*; because it was "*festinum remedium*." s. p. 1 Str. 539. It will not lie upon a writ of *procedendo*; the refusal of a prohibition, or *mandamus* for the party, shall not be hung up on error (1 Str. 391, 543); nor on a judgment *quod computet*, in account; *quod partitio fiat*, in partition; by default, in trespass; on awards of inquiry, on awards interlocutory, and not definitive; nor till the "last judgment" is rendered, on "all the matter with the original," the "whole matter of the cause;" because, till then, the judgment or award is not final. 11 Co. 38 *b*-40 *a*. See Com. Dig. Pleader, Error, B. When an interlocutory judgment or award works a forfeiture, then error lies to be relieved therefrom. 11 Co. 41 *a*. But this is only an exception to a universal rule, that error lies only on a final judgment which determines the whole subject-matter in a cause; from which this court has never yet departed, by any direct adjudication in error, under either the 22d or 25th sections of the judiciary act, or on the rules of the common law.

That the course of opinions delivered in this case by the majority, if not all the other judges, is different from mine, is apparent; but as no judgment has been rendered by the court, this point cannot be judicially settled: it is yet open to argument by counsel, whenever a similar case arises; and of consequence, remains open for the consideration of this court, or any of its members, here or elsewhere, as it has hitherto been considered. My reference to the judiciary act and the opinions of this court, have been more in detail than to principles of the common law, or the adjudged cases; because the former appeared to me to be conclusive, as to what the law of the land and of the court has been, is, and ought to be in future. If it admitted of doubt, as to the latter, it sufficed for the case, to show, by a brief reference, what the common law has been for centuries, and now is, without ever so far departing from what I deem my judicial duty, as to even inquire what it ought to be; as if it was in my power to abrogate, or vary from its rules on this or any other subject. When a point is decided by the adjudged cases, or laid down as settled in the books of acknowledged authority, I take it, and feel bound to act upon it, as the common law, which is

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infused into our jurisprudence ; unless some act of congress, some local law, or some decision of this court, prescribes another rule. When this court declare, that "we are entirely satisfied to administer the law as we find it" (7 Wheat. 45 ; 3 Ibid. 209), I feel bound to endeavor to find, and when found, to follow it in all its course ; and in searching among fountains, rather than the rivulets of the law, for its true principle, I have found no safer guide than its forms, which from ancient times have embodied and preserved, unchanged, those principles which time has consecrated, by the certainty of the law, and the security and repose which an adherence to its rule affords to the rights of property and person.

Forms of writs, process, proceedings in suits, judgments and executions, in all their various applications to matters of jurisprudence, were devised of old, and are yet followed, in order to practically apply the rules and principles of the law they enforce upon persons, property and rights of all description ; and when these forms are overlooked, the principles to which they give life, activity and effect, will be forgotten or disregarded ; nor is there a more effectual mode of producing both results, than, at this day, to look beyond those rules which have prevailed for centuries, and been respected as the land-marks of the law, to the reasons on which they were originally founded, of which this case affords a strong illustration. It is admitted, that in the whole course of the common law, there is no one precedent of a writ of error, upon the proceeding on a writ of *habeas corpus* ; yet it has been earnestly contended at the bar, that error lies in such case, on general principles ; and that the contrary course of the English courts has arisen from the mere omission to enter on the proceeding by *habeas corpus*, the purely technical words, "*ideo consideratum est*," in the order or award made by the court. Had the learned counsel of the relator disclosed to the court the result of an inquiry, why these (so called) technical words were deemed so important, the reasons would have been found to be most decisive in a case of *habeas corpus* or *mandamus* ; for before the statute of ———, no record was made of the proceedings on those writs, no judgment was rendered on them, and consequently, there was no record to remove from an inferior to a superior court, by a writ of error.

The omission of the term "*ideo consideratum est*," which is the appropriate and only form known to the common law to denote the judgment of a court, on a matter of record, in contradistinction to an order or award in granting or refusing a motion, was deemed good evidence that the law did not recognise a decision in which these words were not used, as a final judgment on which a writ of error could be brought ; especially, when, by the common law, such a decision was not made a matter of record, or so considered. However these reasons may operate on the mind of others, they satisfy mine, that they are founded in the best established principles of the common law, and that when they are not found in the forms it has adopted, to denote the action of a court, on a matter before them, their decision is not a judgment of record, cognisable in error, or in the words of Coke and this court ; "that without a judgment or an award in the nature of a judgment, no writ of error doth lie" (6 Pet. 656) ; nor on decisions on motions "addressed to the sound discretion of the court, and as a summary relief which the court is not compellable to allow." Ibid. 657. The refusal to

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quash an execution, is not, in the sense of the common law, a judgment ; much less a final judgment ; it is a mere interlocutory order. Even at the common law, error lies only from a final judgment ; and by the express provisions of the judiciary act, &c., § 22, a writ of error lies in this court only on final judgments. *Ibid.* A writ of error will not lie to a writ of error *coram vobis*, granted by the circuit court to correct its own errors ; “it is subject to the same exceptions which have always been sustained in this court, against revising the interlocutory acts and orders of the inferior courts.” 7 Pet. 147 ; 1 *Ibid.* 340. “It is not one of those remedies over which the supervising power of this court is given.” *Ibid.* 148. “The writ of error (*coram vobis*) was but a substitution for a motion in the court below.” *Ibid.* No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed. 7 Pet. 149 ; s. p. 9 Wheat. 578, cited. In both cases, the writ of error was dismissed, “because it was a case proper for the exercise of that discretion, and not coming within the description of an error in the principal judgment,” *Ibid.* “The decision of the court upon a rule or motion is not of that character (a final judgment) ; this point which is clear by the words of the (judiciary) act, has been often adjudged by this court.” The cases in 6 Pet. 648, and 9 *Ibid.* 4, are noted with approbation, and their principles re-affirmed. See 9 *Ibid.* 602. These are the reasons why a writ of error will not lie at common law, or under the judiciary act, in such cases, and these are the general principles of all law, and the foundation of the universal rule ; that where power is given to any tribunal, to be exercised at its discretion, whether it is legislative, executive, judicial or special, the decision of such tribunal is revisable only by some other tribunal, to which a supervisory power is given. 6 Pet. 729-30 ; s. p. 7 Cranch 42, &c. ; 1 Pet. 340 ; 2 *Ibid.* 163 ; 3 *Ibid.* 203 ; 10 *Ibid.* 472, &c. ; 12 *Ibid.* 611. The forms and modes of expression, by which any tribunal pronounces its discretion to have been exercised, does not affect the nature or character of its decision ; that depends on what it has decided and its effect, whether it is a final judgment, or an interlocutory one, or a mere summary order, direction or decision, on a rule or motion, which is not in law a judgment, though it may be expressed in the words appropriate to a judgment. The law looks to the thing done, as the true test of whether it is cognisable in error. To make it so, there must be a consideration of the record, on the matter of law, not of discretion ; a final judgment of the whole matters of law in the suit, by determining the controversy, and the cause ; which, by the forms of the common law, always is expressed in the dead language of the old forms of judgment, “*ideo consideratum est*,” which has exposed this term to the imputation of technicality ; but when its sense and meaning is expressed in the living language of this court, and applied to the varied subjects and modes of its action, a very different character must be attributed to the significant and appropriate terms in which their decision is announced, according to the case before them.

Thus, in awarding the writ of *habeas corpus*, “the motion is granted,” 4 Cranch 101 ; or, “on consideration of the petition,” &c., “whereupon, it is considered, ordered and adjudged, that a writ of *habeas corpus* be forthwith granted,” &c. 7 Pet. 583. So, where the party is discharged, “it is, therefore, the opinion of the court,” &c., “that there is not sufficient

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evidence," &c., "to justify his commitment" (Ibid. 134), "and therefore, as the crime has not been committed," the court can only direct them to be discharged. Ibid. 136. Or, after reciting the return of the marshal, "on consideration whereof," &c., "it is now here considered," &c., that—be discharged from the writs "in the said return mentioned" (7 Pet. 585); in other words, the motion is granted. On the refusal to award the *habeas corpus*, "on consideration of the rule granted in this case," &c., "it is considered, ordered and adjudged by the court, that the rule be discharged, and that the prayer of the petitioner for a writ of *habeas corpus* be and the same is hereby refused." 3 Pet. 209. Or "upon the whole, it is the opinion of the court, that the motion be overruled." "Writ denied." 7 Wheat. 45. "The rule, therefore, to show cause is denied, and the motion for the *habeas corpus* is overruled" (9 Pet. 710); the motion is not granted. When this court decides on a certificate of division of opinion of the judges of a circuit court, the form is: "this cause came on to be heard on the transcript of the record," &c., "on the questions and points," &c., "certified to this court; on consideration whereof, it is the opinion of this court," that, &c. (3 Pet. 189), the point is decided. On an appeal in a suit in equity, "this cause came on," &c., on "consideration whereof, it is ordered and decreed," &c. 3 Pet. 221. On a writ of error to a circuit court, "this cause came on to be heard on the transcript of the record, &c., on consideration whereof, it is ordered and adjudged by the court, &c." 3 Pet. 241. On a writ of error to a state court, "this cause," &c., "on consideration whereof, it is considered and declared," &c. "It is, therefore, considered and adjudged," &c. (3 Pet. 267), or, "on consideration whereof, it is ordered and adjudged," &c. (Ibid. 291), that the decree or judgment be reversed or affirmed. On a rule to show cause why a *mandamus* should not issue, "on consideration whereof, it is now here considered and ordered by this court, that the rule prayed for be and is hereby granted," 6 Pet. 776. On the motion for a peremptory *mandamus*, after the return, "the court doth therefore direct that a *mandamus* be awarded," &c. 7 (Pet. 648); or, "on consideration of the rule, &c., it is now here considered, ordered and adjudged by this court." 8 Pet. 304-6. On a motion for an attachment or not obeying a peremptory *mandamus*, "the motion is dismissed." 8 Pet. 590. On refusal to grant the rule to show cause, "the rule is therefore refused" (11 Pet. 174); or on a motion for a *mandamus* being denied, "on consideration of the motion, &c., it is now here ordered and adjudged," &c., and "the same is hereby overruled" (12 Pet. 344, 475); or, "the motion for the *mandamus* is denied." 13 Pet. 290. In applying these varied forms to the substance, it is apparent, that this court adheres to those of the common law and its principles, having, it is true, less regard to mere terms, but leaving no difficulty in ascertaining their meaning, in their use, and application to their action on the case before them. Thus, in deciding on a rule or motion, in a case of a *habeas corpus* or *mandamus*, they use or omit, as the case may be, the terms appropriate to a judgment, or those of a mere order directing or declaring the result of their opinion; yet on referring to the subject-matter which they have decided, the court in using the terms denoting judgment, always conclude on consideration of the rule, motion, petition or return; and never leave their action open to any doubt as to the character of their decision, whether it finally disposes

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of the cause, or is a mere summary order, on some matter of an intermediate nature. But when the court proceeds to render a final decree or judgment, on an appeal or writ of error, it is always done in the appropriate language of judgment: "This cause came on to be heard, on the transcript of the record of the — court, &c.," on consideration whereof, &c.; showing that they act upon the cause itself, on a judicial inspection of the record and decide on all the matters of law therein contained (5 Pet. 199), and not on preliminary matters which leave the cause undecided. This action is also on a final judgment or decree of the court below; which decided the whole cause, and would have been conclusive on it, had no appeal or writ of error been taken, or if the law had allowed none; the appellate power can act only on such decrees and judgments; in appeals, it acts on the facts as well as the law of the case; in writs of error, it acts only on the matters of law. 1 Wheat. 335; 2 Ibid. 142; 6 Pet. 49; 7 Ibid. 149, 282; 12 Ibid. 331; 13 Ibid. 164.

These forms lead to the true rules and principle of law which are the test of what judgments, decrees, orders or awards in the nature thereof, are cognisable in error, and what are not; what are so, has been seen; what are not, is most distinctly declared by this court. "We have only to say, that a judge must exercise his discretion in those intermediate proceedings, which take place between the institution and the trial of a suit; and if in the performance of his duty, he acts oppressively, it is not to this court that application is to be made" (8 Pet. 590; s. r. 9 Ibid. 604); "the appropriate redress, if any, is to be obtained by an appeal, after the final decree shall be had in the cause." 13 Ibid. 408. No language can apply more forcibly to a proceeding on the writ of *habeas corpus*. It is intermediate between the institution and trial of the suit or prosecution; it is within the discretion of the court to remand or discharge; their order therein is interlocutory in its nature, not definitive of the suit, but on the mere collateral questions of bail, commitment, or discharge from process of arrest; and whether terms of judgment are used or omitted, in granting or refusing the motion, the substance is the same; no final judgment in the suit is, or can be rendered; it remains open for trial as fully as before the *habeas corpus* was awarded. The cases in this court on *habeas corpus*, are decisive of the point, that no order or judgment rendered in them are final in their nature or effect; and in the very common and familiar case of a question of freedom or slavery, which is decided on the writ of *habeas corpus* on a motion to discharge; it has never been doubted, that the question of right, was perfectly upon a writ of *homine replegiando*, let the decisions on the *habeas corpus* have been either way.

On the review of the forms and principles of the common law, as adopted by this court, there is (as is admitted) no precedent of a writ of a error on a *habeas corpus* being sustained, which is powerful evidence that no principle exists which can justify it; while those which are unquestioned forbid it; and I am utterly unable to comprehend, by what sound rule of jurisprudence, prescribed to the courts of the United States, a double appellate power in the same court, ever can be exercised over the same suit, and the same subject-matter: 1. By the writ of *habeas corpus ad subjiciendum*; 2. By writ of error.

When appellate power is once exerted, it is spent by the judgment of the

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of error, the judgment below must be either affirmed or reversed ; this court must give the same judgment as the court below should have done, unless in the excepted cases, which cannot arise on the *habeas corpus*. And when this is done, there remains the further act of directing a special mandate to another court, to award execution of the judgment of this ; or for this court to do it, in the case provided for. 1 Wheat. 353, &c. There must also be infused into the law, some mode or process by which the order for commitment, bail or discharge, may be superseded by the party suing out the writ of error ; some provision must be also made, as to the progress of the prosecution, during the pendency of the writ of error. Now, process may be issued, or a new indictment may be found for the same offence, nay, a trial may be had, before this court can decide on the sufficiency of the first cause of commitment ; and when they shall have done this by “ a final decision of the cause ” or suit, and sent their “ special mandate to award execution thereupon,” the return to that mandate may be, that the party has been arrested on other process, convicted of the offence, or is at liberty, after an acquittal. This court can award no execution, till the cause has been once remanded, under the 25th section as it now reads. So, in a case coming within the exception of the 24th, for in all other cases, they must, on reversing, render the same judgment which ought to have been rendered below. Now, if we had reversed the judgment of the supreme court of Vermont, we could have rendered a judgment of discharge, for there are no damages to be assessed, and nothing uncertain to be adjudged ; yet we could award no execution, till a mandate had been first sent, and returned unexecuted, or not returned, or returned with the above or the same reasons, as are to be found on the return to the mandate in *Martin v. Hunter*, 7 Cranch 628 ; 1 Wheat. 305-6 : “ That the writ of error in this case was improvidently allowed under the authority of that act (the 25th section) ; that the proceedings thereon in the supreme court were *coram non iudice* in relation to this court, and that obedience to its mandate be declined by the court.”

If such an occurrence has actually happened in a case, where this court had undoubted jurisdiction, it may be expected in future cases of a writ of error, in one like the present ; which can be brought within the law, only by a successive train of implication upon implication, till ingenious reasoning may fasten it to some expression, which may be thought to justify the assumption of the power. But more than jurisdiction must be assumed, before this court could exert it to the extent which such a case requires ; for though resistance to its mandate may be contingent, or merely possible, it ought to be well considered, whether, when it should happen, the court felt assured that they would be sustained by the law and constitution, in enforcing obedience by *mandamus*, attachment, and the imprisonment of the judges of the highest court of a state.

It is not enough, that the term “ any suit ” may embrace a case of *habeas corpus* ; it must be one which in all other respects admits of the action prescribed in the judiciary act, in all its provisions relative to the appellate jurisdiction of this court ; if it is, there will be found no defect of power to execute its final mandate or execution, by the authority of this court. If it is not, then, if the court assumes jurisdiction, it must usurp power to carry into effect a judgment which the law does not recognise, and consequently, makes no provision for its execution. It is dangerous, at least, if not unwise

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or rash, to exercise a power which may be given by the constitution ; but which congress has given no authority to execute, or given in terms so obscure, that to so construe them, is in substance the exercise of legislative power, by the judicial department. However desirable it may be thought, to enlarge jurisdiction, and expand its exercise, so as to embrace cases not yet known to the law, or by so construing the constitution and law, as to make it, by reasoning, what it ought to have been in the text ; and giving inference and incident the effect of ordinance and enactment, increase the ostensible power of the court ; yet, assuredly, it will continue to lose, in public confidence, that moral strength, which can alone insure its efficient and quiet action, in the same proportion as it extends ungranted jurisdiction. No course appears to me to lead more certainly to such results, than that which the court has been urged to take in this case ; had we reversed the (so called) final judgment, and our mandate had encountered new process, &c., our own solemn judgment would have had a most ludicrous effect, as a final decision, of what ? not the suit, cause or prosecution, but on the legality of the original process, which is a most conclusive reason why a decision on mere process is not the subject of a writ of error. Or had the matter remained as it was, our reversal would have respected only the refusal to discharge the party from the process ; our mandate to discharge, would, if executed, leave him liable to arrest on new process, without affecting the suit ; which is an equally conclusive reason to show that a final decision in error on the *habeas corpus* is not such as is contemplated by the 24th or 25th sections, or provided for by either. Or, should that court refuse obedience to our mandate, the predicament of this court would be precisely the same as in *Martin v. Hunter* ; they must, at the next term, proceed in one of the following modes.

1. Follow the precedent of *Martin v. Hunter*—issue “a writ of error” to the supreme court of Vermont, “founded” on their “refusal to obey the mandate of this court ;” raise that refusal to the dignity of a final judgment (*vide* 1 Wheat. 305), and then reverse it, and affirm “the judgment of the district court.” *Ibid.* 262. This, however, would not be a course appropriate to the present case : there is no judgment of any inferior court, or if there was, this court would have no power, by the 25th section, to affirm or reverse it, because the decision complained of was had in the highest court of law of the state (6 Pét. 49) ; nor could any mandate be directed to any other court (1 Wheat. 353 ; 8 Pet. 314) ; and it requires no reasoning to show, that this court ought not, and would not, deal with the jailer or other person who had the custody of the relator. 7 Pet. 282.

2. “Proceed to a final decision of the cause and award execution,” as specially authorized by the 25th section ; but this would be abortive, as there could be no final decision of the cause of prosecution, on a mere inquiry into the cause of commitment ; nor could any execution be awarded against person or property ; and the nature of the case precludes any efficient action, save by a mandate to be directed to the court, most certainly not to the jailer.

3. Issue a peremptory *mandamus* to the judges, to carry the mandate into effect (see 5 Cranch 115 ; 7 Pet. 648 ; 8 *Ibid.* 305), which is expressly authorized by the 14th section of the judiciary act, and is most appropriate to this case ; it being necessary for the exercise of the appellate jurisdiction

of this court, and agreeable to the principles and usages of law—the common law. 12 Pet. 492–3. And if that *mandamus* is not obeyed, then on the authority of the 17th section, award an attachment, and if no sufficient cause is shown to avert it; “punish by fine and imprisonment,” this “contempt of authority.” (1 U. S. Stat. 81, 83.) 1 Story 59, 60. See 8 Pet. 588, 590.

Such is the power with which this court is invested by the constitution and laws, so it may, and ought to be exerted, whenever it becomes necessary to exercise its appellate jurisdiction, in vindicating its authority to enforce the law in its majesty, upon any tribunal, which has rendered a judgment under state authority, in violating of the constitution, a law or treaty of the United States; and refuses to obey the mandate of reversal. On every case which lawfully invokes the action of these powers, this court, I trust, will not hesitate to exert it, that it will, by so doing, “plant” itself in public opinion and confidence, on an “impregnable position” (11 Pet. 139), I cannot doubt; nor, that when this court deliberately takes the first step in exercising jurisdiction on a writ of error to a state court, they will be prepared, and resolved to take the last, should the exigencies of the case invoke it. But if the court is not well assured that the law of the case will fully justify the last, the time for reflection is before the first step is taken: otherwise, they may be induced, if not compelled, to halt, to retrace their steps by retrogression, or to stop the progress of the cause to final judgment and execution, from a doubt whether they have, or the conviction that they have not, the legitimate power to finish what they had begun.

BARBOUR, Justice.—This case being brought before us by a writ of error not from a circuit court of the United States, but from the supreme court of judicature of Vermont, we have no jurisdiction over it, unless it comes within some one of the provisions of the 25th section of the judiciary act. The class of cases described in that section, within which it is supposed that it comes, is defined in the following terms: “or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity.”

Now, the record does not, in terms, state on what ground the court decided; the judgment only declares that the cause of detention and imprisonment, that is, the warrant of the governor of Vermont, is good and sufficient in law. It must, then, according to the decision of this court, appear, by clear and necessary intendment, that the question of the repugnancy of the authority exercised, either to the constitution, or treaties or laws of the United States, must have been raised, and must have been decided, in order to have induced the judgment. As there is neither any treaty nor law having relation to the case, the single inquiry is, whether there is any provision of the constitution to which the authority in question is repugnant; because, if *there is not, then it will follow, that there is no ground [*587 for the clear and necessary intendment, nor for any intendment, that such matter was drawn in question, and decided by the court below; as is absolutely necessary to give this court jurisdiction over a case brought here from a state court.

I proceed, then, to examine the question, whether the constitution contains any such provision? The only clause of that instrument, upon the

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subject of the surrender of fugitives from justice, is found in the second section of the fourth article, and is in these words: "A person charged in any state, with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." This provision, by the obvious import of its terms, has no relation whatsoever to foreign nations; but is confined in its operation to the states of the Union. Nor, indeed, should we have expected to have found in such an instrument any provision upon the subject, except in relation to the states themselves. It is a compact of government between the states, for themselves, and not for others; it consists, therefore, of a designation of the powers granted; the division of those powers amongst the departments which it created; and of such reciprocal stipulations, limitations, and reservations, as the states thought proper to make. But it was no part of the purpose of its framers, to define the duties or obligations of the states, thus united, to foreign nations, or to prescribe the mode of their fulfilment. There is no other clause of the constitution, which, in terms, has even the remotest allusion to the surrender of fugitives from justice.

Before I proceed to examine the various provisions in the text of the constitution, which have been relied upon as bearing upon the question; I will take notice of an argument urged at the bar, as being founded upon the fifth amendment to that instrument. It was said, that the authority exercised in this case, was in violation of that part of the fifth amendment which declares, "that no person shall be deprived of life, liberty or property, without due process of law." This argument is at once met and repelled by the decision of this court, in the case of *Barron v. Mayor and City and City Council of Baltimore*, 7 Pet. 243; in which this court decided, that the amendments to the constitution of the United States, did not apply to the state governments. That they were limitations upon the power granted in the instrument itself; and not upon the power of distinct governments, framed by different persons, and for different purposes. To which I will add, what is matter of history, that so far from the states which insisted upon these amendments, contemplating any restraint or limitation by them on their own powers; the very cause which gave rise to them, was a strong jealousy on their part of the power which they had granted in the constitution. They, therefore, with anxious solicitude, endeavored, *by *588] these amendments, to guard against any misconstruction of the granted powers, which might, by possibility, be the result of the generality of the terms in which they were expressed. But it is unnecessary to dwell longer on this point; because it is not only decided in the case just cited, but it is also declared in the case of the *Lessee of Livingston v. Moore*, 7 Pet. 551-2, to be settled, that the amendments of the constitution of the United States do not extend to the states.

I now return to the text of the constitution itself. It was said in the argument, that by that instrument, the whole foreign intercourse of the country was confided to the federal government. That as between foreign nations and the United States, the individual states are not known. That they are known only in their confederated character, as the United States. That the question as to the surrender of fugitives from justice, being a

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national one, it follows as a consequence, that it can only be decided and acted upon by the United States. It is admitted, that the regulation of our foreign intercourse is confided to the federal government. But that the proposition thus generally propounded, may be reduced to a definite form ; that we may have some standard of practical application by which to test the nature, character and extent of this power over foreign intercourse, and its bearing upon the present question ; it becomes necessary to examine the provisions of the constitution which relate to it ; for it is just that, and that only, which the provisions of that instrument have made it. The only clauses of the constitution, as far as I am informed, which relate to our foreign intercourse, are : 1. The one which gives to the president, with the advice and consent of the senate, power to make treaties, and to nominate and, with the advice and consent of the senate, to appoint ambassadors, other public ministers and consuls. 2. That which gives to the president alone, power to receive ambassadors, and other public ministers. 3. That which absolutely prohibits the states from entering into any treaty, alliance or confederation : and lastly, that which prohibits them, without the consent of congress, from entering into any agreement or compact with a foreign power. Thus it appears, that the whole power of foreign intercourse granted to the federal government, consists in this, that while it is authorized, through the president and senate, to make treaties, the states are prohibited from entering into any treaty agreement or compact, with a foreign state. Now, there is nothing in the record to show that Vermont has violated this prohibition in the constitution, because it does not appear, that that state has entered into any treaty, agreement or compact whatsoever with any foreign state.

The only argument, then, which can be urged, to prove that the act done by the governor of Vermont is a violation of these provisions of the constitution, must be this, if not in form, certainly in effect : The president and senate have power to make treaties with foreign states, but Vermont has surrendered to a foreign state *a fugitive from justice who was within her jurisdiction ; therefore, Vermont has violated that part of [*589 the constitution which authorized the president and senate to make treaties. Can such a conclusion follow from such premises ? I would respectfully say, that to me, it seems to be a *non sequitur*. I am ready to admit, that the president and senate can make treaties, which are not themselves repugnant to the constitution. I further admit, that, as by the usages of nations, as well as by the practice of the United States, the surrender of fugitives is deemed to be a proper subject for treaty ; therefore, it is competent to them to make treaties in relation to that subject. I further admit, that if a treaty had been made, by which the federal government had bound itself to surrender fugitives to a foreign nation, and one had been arrested under the treaty, for the purpose of being surrendered, and the judicial authority of Vermont had discharged him upon *habeas corpus* ; then it might be said, that such discharge was repugnant to the treaty. But the question here is, not whether the act of the governor of Vermont is repugnant to a treaty, for there exists none in relation to the subject ; but the question is, whether it is repugnant to the constitution, because, by that, the president and senate have power to make treaties for the surrender of fugitives, but which power they have not executed ?

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There are two classes of provisions in the constitution, as to which this question may arise. The first is, where the constitution operates *per se*, by its own intrinsic energy. In cases of this class, it is not necessary that any power should be exercised by any department of the federal government, to bring it into active operation. The constitution is, in this class of its provisions, a perpetually self-existing impediment to any action on the part of the states, on the subjects on which they relate. Thus, to exemplify: it declares, that no state shall pass a "bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Now, if a state were to pass either of the kinds of law which are thus prohibited; such a state law, or any authority exercised under it, would necessarily be repugnant to the constitution. The thing done would be in direct opposition to the supreme law of the land, which had commanded that it should not be done. This class of cases, where there is an express prohibition, has no relation whatever to any conflict between the powers granted to the federal government, and those reserved to the states. Such a state law as I have just supposed, would be equally repugnant to the constitution, whether there was or was not any power granted to the federal government over the subject on which such a state law operated. This class embraces also certain cases in which a power, such as had been previously exercised by the states, is granted to the federal government, in terms which import exclusion: such, for example, as the power granted to congress, of exclusive legislation over the district of Columbia. In such a case, it has been held, that although there is no express prohibition upon the states, yet the terms of the grant, by *590] necessary construction, imply it; because a provision that *one government shall exercise exclusive power, is tantamount to a declaration that no other shall; for if any other could, it would cease to be exclusive; and such a declaration is, therefore, in effect, a prohibition. Here, too, then, any action on the part of a state, upon a subject thus exclusively granted to the federal government, would be repugnant to the constitution, operating by its own intrinsic energy, without any action by the federal government; because, as to such cases, the supreme law of the land has declared, in effect, that no state shall enter upon this field of power.

The second class of constitutional provisions, as to which this question of repugnancy may arise, consists of those powers granted to the federal government, which the states previously possessed; where there is nothing in the terms of the grant which imports exclusion, and where there is no express prohibition upon the states. As to this class of powers, the great constitutional problem to be solved is, whether any of them can be construed as being exclusive. If they can, then the necessary consequence is, that the states cannot exercise them; whether the federal government shall or shall not think proper to execute them. If, on the contrary, they are not exclusive, but concurrent, then the states may rightfully exercise them; and no question of repugnancy can ever arise, whilst the power remains dormant and unexecuted by the federal government. Such a question can only occur when the actual exercise of such a power by the states comes into direct conflict with the actual exercise of the same power by the federal government. This characteristic of concurrent powers, is illustrated by the familiar example of the power of taxation. Thus, although the power of laying and collecting taxes is specifically granted to congress, yet the states, as we all

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know, are in the habitual exercise of the same power, over the same people, and the same objects of taxation, and at the same time, as the federal government; except when the states are restrained by an express prohibition from acting on particular objects; that is, from laying any imposts or duties on imports or exports, beyond what may be absolutely necessary for executing their inspection laws. And but for that prohibition, I doubt not but that the states would have had as much power to lay imposts or duties on imports or exports, as to impose a tax on any other subject of taxation.

I hold the following proposition to be maintainable: That wherever a power, such as the states originally possessed, has been granted to the federal government, and the terms of the grant do not import exclusion, and there is no express prohibition upon the states, and the power granted to the federal government is dormant and unexecuted; there the states still retain power to act upon the subject. And I place this upon the ground, that in such a case, the question of repugnancy cannot occur, until the power is executed by the federal government. It is not repugnant to the constitution, because there is not in that instrument either an express prohibition, nor that which is implied by necessary construction arising from words of exclusion. There is, therefore, nothing in the constitution *itself, operating by itself; as it does in cases of express prohibition or terms of [*591 exclusion; to which the exercise of such a power by the states is repugnant, or with which it is utterly incompatible. It is not repugnant to any law passed, or treaty made, by the United States, because my proposition in terms assumes that no such law has been passed, or treaty made. I will add, in support of this view, that as the constitution contains several express prohibitions upon the states, from the exercise of powers granted to the federal government; if we were to apply to its construction the maxims so well founded in reason, *expressio unius, est exclusio alterius*, it would seem to lead to the conclusion, that all the powers were expressly prohibited which were intended to be prohibited; unless in cases of such necessary and inevitable construction as those in which the power is granted in terms of exclusion; which, as I have said, would cease to be exclusive, if the states could still exercise them, and which, therefore, present a case of absolute incompatibility.

From these general principles, I now proceed to the examination of some of the cases in this court, in relation to this question. In *Sturges v. Crowninshield*, 4 Wheat. 122, there is a good deal of discussion on this subject. In p. 193 of that case, the chief justice says, "These powers (he is speaking of the powers granted to congress) proceed not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to congress, did not imply a prohibition on the states to exercise the same power. But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to

congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." After these general remarks, he propounds this question: "Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States of this description?" That is, as explained in the immediately preceding paragraph, one where the terms in which the power is granted to congress, or the nature of the power, required that it should be exclusively exercised by congress. After much other reasoning on the subject, and, amongst other difficulties, stating that of discriminating with any accuracy between insolvent and bankrupt laws, we find him using the following language: "it does not appear to be a violent construction of the constitution, *and is certainly a convenient one, to consider the power of *592] the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states." He proceeds to say, that the circumstance of congress having passed a bankrupt law, had not extinguished, but only suspended the right of the states. That the repeal of the bankrupt law could not confer the power on the states, but that it removed a disability to its exercise which had been created by the act of congress.

In 5 Wheat. 21, Judge WASHINGTON, in delivering the opinion in the case of *Houston v. Moore*, distinctly asserts, that if congress had declined to exercise the power of organizing, arming and disciplining the militia of the several states, it would have been competent to the state governments to have done so, in such manner as they might think proper. In *Wilson and others v. Blackbird Creek Marsh Company*, 2 Pet. 251-2, the legislature of Delaware had passed a law which stopped a navigable creek. In the argument, it was contended, that this law came in conflict with the power of the United States "to regulate commerce with foreign nations, and among the several states." The chief justice, in answer to this argument, said, "If congress had passed any act which bore upon the case, the object of which was to control state legislation over those small navigable creeks, into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying, that a state law, coming in conflict with such act, would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several states; a power which has not been so exercised as to affect the question." He concluded by saying, that the court did not consider the law in question, "under all the circumstances of the case, as repugnant to the power to regulate commerce, in its dormant state, or as being in conflict with any law passed on the subject."

If, then, it be true, that it is not the mere existence of a power, but its

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exercise, which is incompatible with the exercise of the same power by the state; and that, too, where the power given was in express terms, "to establish uniform laws on the subject of bankruptcies, throughout the United States," the term "uniform" making the case stronger than where the grant contains no such term; and if it be also true, that the law of Delaware was not repugnant to *the power to regulate commerce, in its dormant state; then it seems to me, that I have sufficient grounds for the pro- [*593 position which I have laid down.

Let me, then, apply that proposition, and the principles of this court to this case. I have admitted, that the president and senate might make a treaty for the surrender of fugitives from justice, but they have not done so; that power, in relation to this subject, is in a dormant state; the power exists, but has not been exercised; without the exercise of that power by the president and senate, the federal executive has no power to surrender fugitives from justice. This was the authoritative declaration of our government, in 1791, when Mr. Jefferson, then secretary of state, held the following language: "The laws of the United States, like those of England, receive every fugitive (that is, as he had just said before, in the same communication to president Washington, the most atrocious offenders as well as the most innocent victims), and no authority has been given to our executive to deliver them up." The same authoritative declaration was made by Mr. Clay, by direction of President Adams, in the year 1825, in answer to a demand from Canada; and the reason assigned was, that the treaty upon that subject was no longer in force.

It appears, then, that there is no treaty on the subject of surrendering fugitives; that without such treaty, the federal executive has no authority to surrender; the authority, then, exercised by the governor of Vermont, is not repugnant to the power of making treaties, in its dormant state: because, in the language of the chief justice, before cited, it is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is said by one of the judges, in delivering his opinion in the case of *Houston v. Moore*, that the powers of the federal government are exclusive of the states, when there is a direct repugnancy, or incompatibility in the exercise of it by the states. It is not said, whether this repugnancy is produced by the mere existence of the power in the federal government, or by its exercise. But he gives as examples of this, the power to establish a uniform rule of naturalization, for which he refers to *Chirac v. Chirac*, 2 Wheat. 259, 269; and the delegation of admiralty and maritime jurisdiction, for which he refers to 1 Wheat. 304, 337. In the case in 2 Wheaton, the chief justice does say, "that the power of naturalization is exclusively in congress, does not seem to be, and certainly ought not to be, controverted." But the point made, and which immediately precedes this remark was, that the law of Maryland, according to which the party had taken the oaths of citizenship, had been virtually repealed by the constitution of the United States, and the act of naturalization enacted by congress. The remark, then, was made in relation to a power which had been executed. But the case of *Sturges v. Crowninshield* was decided after that of *Chirac v. Chirac*; and in that later case, it was declared, that it was not the mere existence, but the exercise of the power, *which is incompatible with the exercise of the same power [*594

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by the states; and what makes this principle especially applicable is, that the power of establishing a system of naturalization, and bankrupt laws, is contained in the same clause, and expressed, identically, in the same terms. So that, if the mere existence of the power as to bankruptcy, without its exercise, does not prohibit the states from acting on it; by like reason, the mere existence of the power as to naturalization, without its exercise, does not prohibit them from acting on it.

It is said in 1 Wheat. 337, *arguendo*, by the court (for it was not the point to be decided), that admiralty and maritime jurisdiction is of exclusive cognisance. It would seem, from the reasoning of the court, as if this rested upon these grounds: that the constitution is imperative on congress, to vest all the judicial power of the United States, in the courts of the United States; that the judicial power was declared to extend to all cases of admiralty and maritime jurisdiction; and that, therefore, by the terms in which the clause was expressed, the jurisdiction was made exclusive. Such also, seems to be the principle laid down in 1 Kent's Com. 351, where the author says: "Whatever admiralty and maritime jurisdiction the district courts possess, would seem to be exclusive; for the constitution declares, that the judicial power of the United States, shall extend to all cases of admiralty and maritime jurisdiction; and act of congress of 1789, says, "that the district courts shall have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction." It seems to me, then, that neither of these cases impugns the principles which I have laid down.

I consider it wholly irrelative to this case, to inquire, whether the authority exercised by the governor of Vermont was, or was not, justified by the constitution and laws of that state. Not only would the words of the act of congress, under which this case has been brought up, clearly require this construction; but this court has expressly decided the question, in the case of *Jackson v. Lamphire*, 3 Pet. 280, in which they say, that this court has no authority, on a writ of error from a state court, to declare a state law void, on account of its collision with a state constitution.

Upon these grounds, I am of opinion, that this case does not come within the provisions of the 25th section of the judiciary act; and consequently, that the writ of error ought to be dismissed, for want of jurisdiction.

CATRON, Justice.—To distinguish this cause from others that often arise in the states where statutes exist authorizing the arrest of fugitives from justice from other states, and foreign governments, it becomes necessary to ascertain precisely what the case before us is.

First, it must be recollected, there is no statute in Vermont prohibiting those charged with crimes in other states, or foreign countries, *from coming into that state, or authorizing their apprehension if they come [*595 there: so we understand the fact to be; and that the authority to issue the warrant of arrest in this case was assumed by the governor, as chief magistrate and representative of the state. Holmes had been guilty of no crime against the laws of Vermont; but the warrant recites he was a subject of the province of Lower Canada; that he stood indicted for the crime of murder there; and that it was fit and expedient that he should be made amenable to the laws of that province for the offence. The sheriff, in his

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return to the writ of *habeas corpus*, certifies that this warrant was the sole cause of detention and imprisonment. He was not commanded to hold Holmes to answer to the authorities of Vermont ; but ordered forthwith to convey and deliver him to William Brown, the agent of Canada, or to such person or persons, as by the laws of said province should be authorized to receive the same, at some convenient place on the confines of the state, and the province of Canada ; to the end that the said George Holmes might be thence conveyed to the district of Quebec, and there be dealt with as to law and justice appertained.

We will assume, for the present, and for the purposes of the argument, that an agreement to surrender, on which the arrest was founded, existed between the executive chief magistrate of Vermont, and the queen of Great Britain ; that William Brown was the agent of Great Britain, and represented that kingdom ; that Governor Jennison represented Vermont ; and that the arrest was made in part execution of such previous agreement. In such case, I admit, the act would have been one as of nation with nation, and governed by the laws of nations ; that the agreement would have been prohibited by the constitution, and the arrest, in part execution of it, void ; and that the judgment of the state court in favor of the validity of the arrest should be reversed. But that court was not called on to decide (taking the facts assumed to exist), nor are we permitted to determine in this case, how far the state courts and magistrates may go, in dealing with fugitives from justice coming within their limits, when executing the statutes of the states. No such question has been raised at the bar, nor has it been considered of by the bench.

This is the substance of my opinion, drawn up at length, on the point in this cause, on which, for a time, I thought the judgment below ought to be reversed. I founded myself upon the fact, that an agreement to arrest and surrender Holmes had been made between Vermont and Great Britain, before the arrest took place ; and that it was made in part execution of such previous agreement. Neither on the argument of the cause, nor at any time previous to hearing read the opinion of my four brethren, drawn up by the chief justice, and with the result of which I had intended to concur, had it occurred to me, the fact was doubtful. In that opinion, however, it is declared, that "nothing appears that a demand was made by Canada of Holmes ; and we do not act upon the supposition such a demand was made ; nor consider it in the case." Now, if no demand was made, I take it as granted, no agreement existed between Great Britain and Vermont for the surrender of Holmes. To assume that a general regulation by treaty or agreement, existed between the state and the foreign kingdom, on which the 'governor's warrant founds itself, and from which the regulation must be inferred, would be charging the chief magistrate of Vermont with a palpable violation of the constitution of the United States, on the ground that he assumed the power of foreign intercourse. There is nothing in the record to establish such a conclusion ; nor can it be assumed, with any propriety, on mere conjecture. It is manifest to my mind, the facts stated in the warrant have reference to this individual case. The arrest could, therefore, not have been made in part execution of any compact or agreement between the state and kingdom : it follows, a judgment of reversal could only be founded on the intention of the governor to make a future

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agreement, at the time Holmes should be surrendered to Brown, or to some sheriff, or other officer, or agent of Canada, having lawful authority to receive the prisoner. The intent, we are not authorized to try; we only have jurisdiction to examine into acts done; and must proceed, if at all, on some past violation of the constitution of the United States, supposed to be that clause which declares, "no state shall, without the consent of congress, enter into any agreement or compact with another state, or with a foreign power." The defendant, Holmes, is yet in prison under the governor's warrant of arrest; no agreement to surrender him yet exists, and none may ever be made with Great Britain; the act done by the governor, is singly that of Vermont, and therefore, cannot violate the recited clause of the constitution.

All my brethren, those who are for reversing the judgment, and those who are for dismissing the writ of error, have adopted, and are acting on the supposition, that no demand to surrender Holmes can be inferred from the facts recited in the warrant of the governor; and that the fact is considered out of the case. After much consideration, I entertain some doubts, whether such an inference could be safely made; and deem it due to the opinion of all my brethren, on the finding of a mere fact in so delicate a matter, to concur with them in the conclusion that no demand was made, and that, consequently, no agreement existed; and therefore, to concur with those who think the writ of error should be dismissed. A consequence inevitable to my mind, viewing the case in this aspect.

That an intent to surrender, is equivalent to an agreement between two states, and therefore, the arrest in violation of the constitution of the United States, is a doctrine calculated to alarm the whole country. *The *597] constitution equally cuts off the power of the states to agree with each other, as with a foreign power; yet, it is notoriously true, that for the fifty years of our existence under the constitution, the states have, in virtue of their own statutes, apprehended fugitives from justice from other states, and delivered them to the officers of the state where the offence was committed; and this, independently of the fourth article and second section of the constitution, and the act of congress of 1793, ch. 51, which provides for a surrender on the demand of the executive of one state upon that of another. The uniform opinion heretofore has been, that the states, on the formation of the constitution, had the power of arrest and surrender in such cases; and that so far from taking it away, the constitution had provided for its exercise, contrary to the will of a state, in case of an unjust refusal; thereby settling, as amongst the states, the contested question whether on a demand, the obligation to surrender was perfect and imperative, or whether it rested on comity, and was discretionary.

After having had written out for me the very able argument delivered before this court, for the plaintiff in error; and after having bestowed much reflection on this subject, and written out my views on every point involved, as the safest mode of testing of their accuracy; I have come to the conclusion, divided as the court is, that it is better for the country, this question should for the present remain open. And I here take the occasion to say, that I hold myself free, and uncommitted by this opinion, or by anything occurring in this cause, to decide, in future cases, according to their character, and the conclusions I may then form.

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I concur, that a proceeding by *habeas corpus* is a suit, within the meaning of the judiciary act, § 25 ; and that a refusal to discharge a defendant is a final judgment in such suit. 1. But whether a writ of error will lie, must depend, in every case, on the fact : This court only has jurisdiction where the decision in the state court has drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States ; and the decision is against their validity. 2. Or, where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, &c., of the United States ; and the decision is in favor of such their validity. 3. Or, where is drawn in question the construction of any clause of the constitution, &c., and the decision is against the right claimed under such clause.

The agreement being out of the case, the arrest, as an authority exercised under the state, and the decision in favor of its validity, could not be repugnant to the constitution ; as the court did not uphold an agreement, or an exercise of authority under any. Nor can I find that the decision below drew in question the construction of an other clause of the constitution, more than the one prohibiting *agreements with foreign powers. [*598 There being no agreement in the case ; certainly none of the exclusive powers secured to the general government, to declare war, to send ambassadors, to make treaties, or to regulate commerce with foreign nations, were violated ; as no national intercourse of any kind was had by Vermont with the authorities of Great Britain.

Whether the arrest violated the laws of Vermont, is immaterial to this court ; we have no power, under the 25th section, to interfere, and must leave parties injured to seek redress in the state courts.

It follows, from the nature of the case, this court has no jurisdiction to entertain the writ of error ; which, I think, should be dismissed.

THIS cause came on to be heard, on the transcript of the record from the supreme court of judicature of the state of Vermont, and was argued by counsel : On consideration whereof, it is now here ordered and adjudged by this court, that this writ of error to the said supreme court be and the same is hereby dismissed, for the want of jurisdiction.

NOTE.—The reporter has inserted this case in the present volume of reports, although no decision on the questions presented to the court was given. The principles, discussed with great ability by the counsel for the plaintiff in error, the importance of the questions involved in it, and the great judicial learning and knowledge contained in the opinions delivered by the justices of the court, are of the highest interest. Although no judgment was given in the case, it will be seen that a majority of the court concurred in the opinion, that the governor of the state of Vermont had not the power to deliver up to a foreign government a person charged with having committed a crime in the territory of that government.

After this case had been disposed of in the supreme court of the United States, on a *habeas corpus* issued by the supreme court of judicature of the state of Vermont, George Holmes was discharged. The judges of that court were satisfied, on an examination of the opinions delivered by the justices of the supreme court, that by a majority of the court it was held, that the power claimed to deliver up George Holmes did not exist.¹

¹ See *Ex parte Holmes*, 12 Vt. 631.

The first of these is the fact that the British government had been in a state of financial distress since the end of the American Revolution. The government had borrowed heavily from foreign lenders, and the interest payments on these loans were a heavy burden. The government had also been forced to raise taxes in order to pay the interest on the loans. This had led to a general feeling of discontent among the British people, and the government had been forced to make a number of concessions in order to win their support.

The second of these is the fact that the British government had been in a state of political instability since the end of the American Revolution. The government had been divided into two main parties, the Tories and the Whigs, and the Tories had been in power since 1783. The Tories had been a conservative party, and they had been opposed to the reforms that the Whigs had been pushing for. The Whigs had been a liberal party, and they had been in favor of the reforms. The Tories had been in power since 1783, and they had been in a state of political instability since the end of the American Revolution.

The third of these is the fact that the British government had been in a state of military weakness since the end of the American Revolution. The British army had been reduced in size, and the British navy had been weakened. The British government had been forced to make a number of concessions in order to win the support of the British people, and the British government had been forced to make a number of concessions in order to win the support of the British people.

The fourth of these is the fact that the British government had been in a state of economic weakness since the end of the American Revolution. The British economy had been in a state of depression, and the British government had been forced to make a number of concessions in order to win the support of the British people. The British government had been forced to make a number of concessions in order to win the support of the British people, and the British government had been forced to make a number of concessions in order to win the support of the British people.

The fifth of these is the fact that the British government had been in a state of diplomatic weakness since the end of the American Revolution. The British government had been in a state of diplomatic weakness, and the British government had been forced to make a number of concessions in order to win the support of the British people. The British government had been forced to make a number of concessions in order to win the support of the British people, and the British government had been forced to make a number of concessions in order to win the support of the British people.

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PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

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ACTION.

1. A note to be paid "in the office notes of a bank" is not negotiable by the usage or custom of merchants; not being a promissory note by the law-merchant, the statute of Anne, or the kindred acts of assembly of Pennsylvania, it is not negotiable by indorsement; and not being under seal, is not assignable by the act of assembly of Pennsylvania on that subject, relating to bonds. No suit could be brought upon it in the name of the indorser; the legal interest in the instrument continues in the person in whose favor it was drawn, whatever equity another may have to claim the sum due on the same; and he only can be the party to a suit at law on the instrument. *Irvine v. Lowry*.....*293
2. The declaration in an action by an executor, for the recovery of money received by the defendant, after the decease of the testator, may be in the name of the plaintiff, as executor, or in his own name, without stating that he is executor; the distinction is, that when an executor sues on a cause of action which occurred in the lifetime of the testator, he must declare in the *detinet*, that is, in his representative capacity only; but when the cause of action accrues after the death of the testator, if the money when received will be assets, the executor may declare in his representative character, or in his own name. *Kane v. Paul*.....*33
3. An action was instituted in the circuit court of Mississippi on a promissory note, dated at and payable in New York; the declaration omitted to state the place at which the note was payable, and that a demand of payment had been made at that place: *Held*,

that to maintain an action against the drawee or indorser of a promissory note or bill of exchange, payable at a particular place, it is not necessary to aver in the declaration, that the note, when due, was presented at the place for payment, and was not paid; but the place of payment is a material part of the description of the note, and must be set out in the declaration. *Covington v. Comstock*.....*43

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

AGENT OR FACTOR.

See FACTOR.

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See INSURANCE.

BOUNDARIES OF STATES.

1. In a case in which sovereign states of the United States are litigating a question of boundary between them, in the supreme court of the United States, the court have decided, that the rules and practice of the court of chancery should, substantially, govern, in conducting the suit to a final close. *Rhode Island v. Massachusetts*.....*210
2. In a controversy where two sovereign states are contesting the boundary between them, it is the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring the case to a final hear-

ing on its merits ; it is too important in its character, and the interests concerned too great, to be decided upon mere technical principles of chancery pleadings.....*Id.*

3. The state of Rhode Island, in a bill against the state of Massachusetts, for the settlement of the boundary between the states, had set forth certain facts on which she relied in support of the claim for the decision of the supreme court, that the boundary claimed by the state of Massachusetts was not the true line of division between the states, according to their respective charters ; to this bill the state of Massachusetts put in a plea and answer, which the counsel for the state of Rhode Island deemed to be insufficient. On a question whether the plea and answer were sufficient, the court held : that as, if the court proceeded to decide the case upon the plea, it must assume, without any proof on either side, that the facts stated in the plea are correctly stated, and incorrectly set forth in the bill, then it would be deciding the case upon such an issue as would strike out the very gist of the complainant's case, and exclude the facts upon which the whole equity is founded, if the complainant has any. That it would be unjust to the complainant not to give an opportunity of being heard according to the real state of the case between the parties ; and to shut out from consideration the many facts on which he relies to maintain his suit.....*Id.*

4. The plea of the state of Massachusetts, after setting forth various proceedings which preceded and followed the execution of certain agreements with Rhode Island, conducing to show the obligatory and conclusive effect of those agreements upon both states, as an accord and compromise of a disputed right, proceeded to aver, that Massachusetts had occupied and exercised jurisdiction and sovereignty, according to the agreement, to this present time ; and then set up as a defence, that the state of Massachusetts had occupied and exercised jurisdiction over the territory from that time up to the present ; the defendants then pleaded the agreements of 1710 and 1718, and unmolested possession from that time, in bar to the whole bill of the complainant. The court held, that this plea was twofold : 1. An accord and compromise of a disputed right. 2. Prescription, or an unmolested possession from the time of the agreement. These two defences are entirely distinct and separate, and depend upon different principles ; here are two defences in the same plea, contrary to the established rules of pleading ; the accord and compromise, and the title by prescription, united in this plea, render it multifarious ;

and it ought to be overruled on this account.....*Id.*

CASES CITED AND AFFIRMED.

1. Arredondo's Case, 6 Pet. 691. *United States v. Wiggins*.....*334
2. Bank of Augusta v. Earle, 13 Pet. 584. *Runyan v. Coster*.....*122
3. Beers v. Houghton, 9 Pet. 332. *United States v. Knight*.....*301
4. Boyle v. Zacharie, 6 Pet. 648. *Evans v. Gee**1
5. Eliason v. Henshaw, 4 Wheat. 225. *Carr v. Duval*.....*77
6. Fairfax v. Hunter, 7 Cranch 61. *Runyan v. Coster*.....*122
7. Foster v. Neilson, 2 Pet. 254 ; and *Garcia v. Lee*, 12 Ibid. 511, which cases decide against the validity of the grants made by the Spanish government, in the territory lying west of the Perdido river, and east of the Mississippi river, after the Louisiana treaty of 1803, cited and affirmed. *Keene v. Whittaker*.....*172
8. Hunt v. Rousmanier, 8 Wheat. 211. *Sprigg v. Bank of Mount Pleasant**201
9. Kelly v. Jackson, 6 Pet. 632. *United States v. Wiggins*.....*334
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11. McCulloch v. State of Maryland, 4 Wheat. 422 ; and American Insurance Company v. Canter, 1 Pet. 542, cited. *United States v. Gratiot*.....*526
12. Owings v. Hull, 9 Pet. 624 ; *Percheman's Case*, 7 Ibid. 51 ; *United States v. Delespine*, 12 Ibid. 655, cited. *United States v. Wiggins*.....*334
13. Rhode Island v. Connecticut, 12 Pet. 735. *Rhode Island v. Massachusetts*.....*210
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CERTIFICATE OF DIVISION.

1. Action in the district court of the United States for the southern district of New York, by the United States against the defendant, for a penalty under the act of 1838, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam;" a verdict was rendered for the United States, and without a judgment on the verdict, the case was, by consent, removed to the circuit court of the United States ; in the circuit court certain questions were presented on the argu-

- ment, and a statement was made of those questions, and they were certified *pro forma*, at the request of the counsel for the parties, to the supreme court, for their decision; no difference of opinion was actually expressed by the judges of the circuit court. The judgment or other proceedings on the verdict ought to have been entered in the district court; it was altogether irregular to transfer the proceedings in that condition to the circuit court. The case was remanded to the circuit court. *United States v. Stone*.....*524
2. In some cases, where the point arising is one of importance, the judges of the circuit court have sometimes, by consent, certified the point to the supreme court, as upon a division of opinion; when in truth they both rather seriously doubted, than differed about it. Those must be cases sanctioned by the judgment of one of the judges of the supreme court, in his circuit..... *Id.*

CHANCERY AND CHANCERY PRACTICE.

1. A decree for a specific performance of a contract to sell lands, refused, because a definite and certain contract was not made; and because the party who claimed the performance had failed to make it definite and certain on his part, by neglecting to communicate by the return of the mail conveying to him the proposition of the vendor, his acceptance of the terms offered. *Carr v. Duval*.....*77
2. If it be doubtful whether an agreement has been concluded, or it is a mere negotiation, chancery will not decree a specific performance..... *Id.*
3. A bill for an injunction was filed, alleging that the parties who had obtained a judgment at law for the amount of a bill of exchange, of which the complainant was indorser, had, before the suit was instituted, obtained payment of the bill from a subsequent indorser, out of the funds of the drawers of the bill, obtained by the subsequent indorser, from one of the drawers. It was held, that it was not necessary to make the subsequent indorser, who was alleged to have made the payment, a party to the injunction bill. *Atkins v. Dick*...*114
4. By a rule of the supreme court, the practice of the English courts of chancery is the practice in the courts of equity in the United States. In England, the party who puts in a plea, which is the subject of discussion, has the right to begin and conclude the argument; the same rule should prevail in the courts of the United States, in chancery cases. *Rhode Island v. Massachusetts*.....*210

5. In a case in which two sovereign states of the United States are litigating a question of boundary between them, in the supreme court of the United States, the court have decided, that the rules and practice of the court of chancery should substantially govern in conducting the suit to a final issue. (12 Pet. 735-9.) The court, on re-examining the subject, are fully satisfied with the decision..... *Id.*
6. In a controversy where two sovereign states are contesting the boundary between them, it is the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring the case to a final hearing on its merits; it is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of chancery pleading..... *Id.*
7. In ordinary cases between individuals, the court of chancery has always exercised an equitable discretion in relation to its rules of pleading, whenever it has been found necessary to do so, for the purposes of justice. In a case in which two sovereign states are contesting a question of boundary, the most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength. If a plea put in by the defendant may in any degree embarrass the complainant in bringing out the proofs of his claim, on which he relies; the case ought not to be disposed of on such an issue. Undoubtedly, the defendant must have the full benefit of the defence which the plea discloses, but, at the same time, the proceedings ought to be so ordered, as to give the complainant a full hearing on the whole of his case..... *Id.*
8. According to the rules of pleading in the chancery courts, if the plea be unexceptionable in its form and character, the complainant must either set it down for argument, or he must reply to it, and put in issue the facts relied on in the plea; if he elect to proceed in the manner first mentioned, and sets down the plea for argument, he then admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent the recovery; if, on the other hand, he replies to the plea, and denies the truth of the facts therein stated, he admits that if the particular facts stated in the plea are true, they are then sufficient in law to bar his recovery; and if they are proved to be true, the bill must be dismissed, without a reference to the equity arising from any other facts stated in the bill..... *Id.*
9. If a plea, upon argument, is ruled to be sufficient in law to bar the recovery of the

- complainant, the court of chancery would, according to its uniform practice, allow him to amend, and put in issue, by a proper replication, the truth of the facts stated in the plea; but in either case, the controversy would turn altogether upon the facts stated in the plea, if the plea is permitted to stand. It is the strict and technical character of those rules of pleading, and the danger of injustice often arising from them, which has given rise to the equitable discretion always exercised by the courts of chancery in relation to pleas. In many cases, when they are not overruled, the court will not permit them to have the full effect of a plea; and will, in some cases, leave to the defendant the benefit of it at the hearing; and in others, will order it to stand for an answer, as, in the judgment of the court, may best subserve the purposes of justice. *Id.*
10. The state of Rhode Island, in a bill against the state of Massachusetts, for the settlement of the boundary between the states, had set forth certain facts on which she relied in support of her claim for the decision of the supreme court, that the boundary claimed by the state of Massachusetts was not the true line of division between the states, according to their respective charters; to this bill, the state of Massachusetts put in a plea and answer, which the counsel for the state of Rhode Island deemed to be insufficient. On a question, whether the plea and answer were insufficient, the court held, that as, if the court proceeded to decide the case upon the plea, it must assume, without any proof on either side, that the facts stated in the plea are correctly stated, and incorrectly set forth in the bill, then it would be deciding the case upon such an issue as would strike out the very gist of the complainant's case, and exclude the facts upon which the whole equity is founded, if the complainant had any. *Id.*
11. It is a general rule, that a plea ought not to contain more defences than one; various facts can never be pleaded in one plea, unless they are all conducive to the single point on which the defendant means to rest his defence. *Id.*

See INJUNCTION.

CHARGE OF THE COURT.

1. The grantor in the deed was David Carrick Buchanan, and he declared in it that he was the same person who was formerly David Buchanan. The circuit court were required to charge the jury, that it was necessary to convince the jury, by proofs in court, that

David Carrick Buchanan was the same person as the grantor named in the patent, David Buchanan; and that the statement by the grantor was no proof to establish the fact; the circuit court instructed the jury, that they must satisfied from the deed and other documents, and the circumstances of the case, that the grantor in the deed was the same person to whom the patent was issued; and they declared their opinion that such was the fact. The principle is well established, that a court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of opinion, in regard to the facts. When a matter of law is given by the court to the jury, it should be considered by the court as conclusive; but a mere matter of opinion as to the facts will only have such an influence on the jury as they may think it entitled to. *Games v. Dunn*. *322

CHESAPEAKE AND OHIO CANAL COMPANY.

1. The legislatures of Virginia and Maryland authorized the surrender of the charter granted by those states to the Potomac Company to be made to the Chesapeake and Ohio Canal Company, the stockholders of the Potomac Company assenting to the same; a provision was made in the acts authorizing the surrender, for the payment of a certain amount of the debts of the Potomac Company, by the Chesapeake and Ohio Canal Company, a list of those debts to be made out, and certified by the Potomac Company. This assignment does not impair the obligation of the contract of the Potomac Company with any one of its creditors, nor place him in a worse situation in regard to his demand; the means of payment possessed by the old company are carefully preserved, and indeed, guaranteed by the new corporation; and if the fact can be established, that some *bond fide* creditors of the Potomac Company were unprovided for in the new charter, and have, consequently, no redress against the Chesapeake and Ohio Canal Company, it does not follow, that they are without remedy. *Smith v. Chesapeake and Ohio Canal Company* *45

CIRCUIT COURTS.

1. The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the circuit courts, with which the supreme court ought not to interfere; unless it shall choose to prescribe some fixed general rules on the

subject, under the authority of the act of congress. The circuit courts possess this discretion in as ample a manner as other judicial tribunals. *Philadelphia and Trenton Railroad Company v. Stimpson*..... *448

CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

See HEADS OF DEPARTMENTS, 1-5 : MANDAMUS.

CONSIGNOR AND CONSIGNEE.

See FACTOR.

CONSTITUTION.

1. The fourth article of the constitution of the United States, which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," cannot, by any just construction of its words, be held to embrace an alleged error in a decree of a state court, asserted to be in collision with a prior decision of the same court in the same case. *Mitchell v. Lenox*.....*49

CONSTITUTIONALITY OF STATE LAWS.

1. The plaintiffs, merchants of New York, instituted a suit in the circuit court of Alabama, against the administrators of the maker of a note, dated in New York, and payable in New York; the act of the assembly of Alabama provides, that the estate of a deceased person, which is declared to be insolvent, shall be distributed by the executors or administrators, according to the provisions of the statute, among the creditors; and that no suit or action shall be commenced or sustained against any executor or administrator, after the estate of the deceased has been represented as insolvent, except in certain cases not of the description of that on which this suit was instituted: *Held*, that the insolvency of the estate, judicially declared under the statute of Alabama, was not sufficient in law to abate a suit instituted in the circuit court of the United States, by a citizen of another state, against the representative of a citizen of Alabama. *Snydam v. Broadnax*.....*67
2. The exceptions in the sixth section of the law of Alabama, in favor of debts contracted out of the state, prevent the application of the statute, or its operation, in a case of a debt originating in and contracted by the deceased out of the state of Alabama...*Id.*
3. A sovereign state and one of the states of this Union, if the latter were not restrained

by constitutional prohibitions, might, in virtue of sovereignty, act upon the contracts of its citizens, wherever made, and discharge them, by denying the right of action upon them in its own courts; but the validity of such contracts as were made out of the sovereignty or state, would exist and continue everywhere else, according to the *lex loci contractus*.....*Id.*

CONSTRUCTION OF STATUTES.

1. It is undoubtedly a duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operations within narrower limits than its words import, if the court are satisfied that the literal meaning of its words would extend to cases, which the legislature never designed to include in it. *Brewer v. Blougher*.....*178
2. In expounding a penal statute, the court, certainly, will not extend it beyond the plain meaning of its words; for it has been long and well settled, that such statutes must be construed strictly; yet the evident intention of the legislature ought not to be defeated by a forced and over-strict construction. *United States v. Morris*.....*464

See SLAVE-TRADE.

CONSTRUCTION OF UNITED STATES STATUTES.

1. Action on a bond to the United States for the liberty of the jail-yard of Portland, in the state of Maine; the condition of the bond was, that J. K. and B. K. should "continue true prisoners in the custody of the jailer, within the limits of the jail-yard;" it was agreed by the counsel for the plaintiff and defendants, that J. K. and B. K. had remained within "the limits of the jail-yard," as established under the laws of 1787, of Massachusetts, then prevailing in Maine; the limits of the jail-yard having, in October, 1798, been extended over the whole county; but had not remained within the limits established on the 29th of May 1787, and existing when the act of congress was passed, 4th of January 1800, authorizing persons under process from the United States, to have the "jail limits" as established by the laws of the state: *Held*, that the act of congress of 19th May 1828, gave the debtors imprisoned under executions from the courts of the United States, at the suit of the United States, the privilege of the jail limits in the several states, as they were fixed by

- the laws of the several states at the date of that act. *United States v. Knight*....*302
2. Whatever might be the liability of the officer who took the bond from the defendants, if the jail limits continued to be such as were established under the laws of Massachusetts, of 1787, the bond not having been taken under that law, and the condition being different from the requirements of those regulations; the parties to the bond, the suit being upon the bond, are bound for nothing whatsoever, but what is contained in the condition; whether it be or be not conformable with the law.....*Id.*
 3. The statute of May 19th, 1828, entitled, "an act to farther regulate processes in the courts of the United States," which proposes only to regulate the mode of proceeding in civil suits, does not divest the public of any right, does not violate any principle of public policy, but on the contrary, makes provision, in accordance with the policy which the government has indicated, by many acts of previous legislation, to conform to state laws in giving to persons imprisoned under their execution, the privilege of jail limits, embracing executions at the suit of the United States.....*Id.*
 4. The act of congress under which title was claimed, being a private act, and for the benefit of the city of Mobile, and certain individuals; it is fair to presume, it was passed with reference to the particular claims of individuals, and the situation of the land embraced in the law, at the time it was passed. *Pollard's Heirs v. Kibbe*....*353
 5. A lot of ground was granted by the Spanish government of Florida, in 1802, to Forbes & Company, in the city of Mobile, which was afterwards confirmed by the commissioners of the United States; the lot granted was 80 feet in front, and 304 feet in depth, bounded on the east by Water street; this, while the Spanish government had possession of the territory, was known as "a water lot." In front of this lot, was a lot which, at the time of the grant of the lot to Forbes & Company, was covered by the water of the bay and river of Mobile, the high tide flowing over it; and it was separated from Forbes & Company's lot, by Water street; it was afterwards, in part, reclaimed by Lewis, who had no title to it, and who was afterwards driven off by one of the firm of Forbes & Company; a blacksmith's shop was then put on the lot by them; and Lewis, again, by proceedings at law, obtained possession of the blacksmith's shop, it not being his improvement; the improvement was first made in 1823; the Spanish governor, in 1809, after the Louisiana treaty of 1803, and before the territory west of the Perdido was out of the possession of Spain, granted the lot in front of the lot owned by Forbes & Company, to William Pollard; but the commissioners of the United States, appointed after the territory was in the full possession of the United States, refused to confirm the same, "because of the want of improvement and occupancy." In 1824, congress passed an act, the second section of which gave to those who have improved them, the lots in Mobile, known under the Spanish government as "water lots;" except when the lot so improved had been alienated, and except lots of which the Spanish government had made "new grants," or orders of survey, during the time the Spanish government had "power" to grant the same; in which case, the lot was to belong to the alienee or the grantee. In 1836, congress passed an act for the relief of William Pollard's heirs, by which the lot granted by the Spanish government of 1809, was given to the heirs, saving the rights of third persons; and a patent for this lot was issued to the heirs of William Pollard, by the United States, on the second of July 1836: *Held*, that the lot lying east of the lot granted in 1802, by the Spanish government, to Forbes & Company, did not pass by that grant to Forbes & Company; that the act of congress of 1824 did not vest the title in the lot east of the lot granted in 1802 in Forbes & Company; and that the heirs of Pollard, under the second section of the act of 1824, which excepted from the grant to the city of Mobile, &c., lots held under "new grants" from the Spanish government, and under the act of congress of 1836, were entitled to the lot granted in 1809, by the Spanish governor to William Pollard....*Id.*
 6. The term "new grants," in its ordinary acceptation, when applied to the same subject or object, is the opposite of "old;" but such cannot be its meaning in the act of congress of 1824; this term was doubtless used in relation to the existing condition of the territory in which such grants were made. The territory had been ceded to the United States by the Louisiana treaty; but in consequence of a dispute with Spain about the boundary line, had remained in the possession of Spain; during this time Spain continued to issue evidences of titles to lands within the territory in dispute. The term "new" was very appropriately used as applicable to grants and orders of survey of this description, as contradistinguished from those issued before the cession....*Id.*
 7. The time when the Spanish government had the "power" to grant lands in the territory, by every reasonable intendment of the act of

cong. ess of 1824, must have been so designated with reference to the existing state of the territory, as between the United States and Spain; the right to the territory being in the United States, and the possession in Spain. The language, "during the time at which Spain had the power to grant the same," was, under such circumstances, very appropriately applied to the case; it could, with no propriety, have been applied to the case, if Spain had full dominion over the territory, by the union of the right and the possession; and in this view, it is no forced interpretation of the word "power," to consider it here used as importing an imperfect right, as distinguished from complete lawful authority. *Id.*

8. The act of congress of 25th April 1812, appointing commissioners to ascertain the titles and claims to lands on the east side of the Mississippi, and west side of the Perdido, and falling within the cession of France, embraced all claims of this description; it extended to all claims, by virtue of any grant, order of survey, or other evidence of claim whatsoever, derived from the French, British or Spanish governments; and the reports of the commissioners show, that evidence of claims of various descriptions, issued by Spanish authority, down to 1810, come under their examination. And the legislation of congress shows many laws passed confirming incomplete titles, originating after the date of the treaty between France and Spain at St. Ildefonso; such claims are certainly not beyond the reach of congress to confirm; although it may require a special act of congress for that purpose. Such is the act of congress of 2d July 1836, which confirms the title of William Pollard's heirs to the lot which is the subject of this suit. *Id.*

See CONSTRUCTION OF STATUTES, 2: PERJURY:
SLAVE TRADE.

CONTRACTS.

1. It has been frequently held, that the device of covering property as neutral, when in truth it was belligerent, is not contrary to the laws of war or of nations; contracts made with underwriters in relation to property thus covered, have always been enforced in the courts of a neutral country, where the true character of the property, and the means taken to protect it from capture have been fairly represented to the insurers. The same doctrine has always been held, where false papers have been used to cover the property, provided the underwriter knew, or was bound

to know, that such stratagems were always resorted to by persons engaged in that trade. If such means may be used to prevent capture, there can be no good reason for condemning with more severity the continuation of the same disguise, after capture, in order to prevent the condemnation of the property, or to procure compensation for it, when it has been lost by reason of the capture. Courts of the capturing nation would never enforce contracts of that description; but they have always been regarded lawful in the courts of a neutral country. *De Valengin v. Duffy*. *282

2. The Bank of the Metropolis contracted to deliver a title in fee-simple to Gutschlick, of a lot of ground, and at the time of the contract they held the lot, by virtue of a sale made under a deed of trust, at which sale they became the purchasers of the property; the same lot had, by a deed of trust, executed by the same person, been previously conveyed to another person, to indemnify an indorser of his notes, and it was by the trustee, afterwards, and after the contract with Gutschlick, sold and purchased by another: *Held*, that at the time of the contract, they had not a fee-simple in the lot, which could be conveyed to Gutschlick. *Bank of the Metropolis v. Gutschlick*. . *19

CORPORATION.

1. A corporation may be bound by contracts, not executed under their common seal, and by the acts of its officers in the course of their official duties; when, in a declaration, it is averred, that a bank by its officers agreed to a certain contract, this averment imports everything to make the contract binding. *Bank of the Metropolis v. Gutschlick*. . *19
2. A paper executed by the president and cashier of a bank, purporting to convey a lot of ground held by the bank, is not the deed of the corporation. *Id.*
3. An action of *assumpsit* was brought against the Bank of the Metropolis, on a contract under the seals of the president and cashier: *Held*, that the action was well brought; it makes no difference, in an action of *assumpsit* against a corporation, whether the agent was appointed under the seal or not; or whether he puts his own seal to a contract which he makes in behalf of the corporation. *Id.*
4. The artificial being, a corporation aggregate, is not, as such, a citizen of the United States; yet the courts of the United States will look beyond the mere corporate character, to the individuals of whom it is composed; and if they were citizens of a different state from

- the party sued, they are competent to sue in the courts of the United States; but all the corporators must be citizens of a different state from the party sued. The same principle applies to the individuals composing a corporation aggregate, when standing in the attitude of defendants, which does when they are in that of plaintiffs. *Commercial and Railroad Bank v. Slocomb*, *60; *S. P. Irvine v. Lowry*. *393
5. The legislature of the state of New York, on the 18th of April 1823, incorporated "The New York and Schuylkill Coal Company;" the act of incorporation was granted for the purpose of supplying the city of New York and vicinity with coal; and the company having, at great expense, secured the purchase of valuable and extensive coal lands in Pennsylvania, the legislature of New York, to promote the supply of coal as fuel, granted the incorporation, with the usual powers of a body corporate, giving to it the power to purchase and hold lands, to promote and attain the objects of the incorporation. The recitals in the act of incorporation showed that this power was granted with special reference to the purchase of lands in the state of Pennsylvania; the right to hold the lands so purchased depends on the assent or permission, express or implied, of the state of Pennsylvania. *Runyan v. Coster* *122
6. The policy of the state of Pennsylvania, on the subject of holding lands in the state, by corporations, is clearly indicated by the act of the legislature of Pennsylvania, of April 6th, 1833. Lands held by corporations of the state, or of any other state, without license from the commonwealth of Pennsylvania, are subject to forfeiture to the commonwealth; but every such corporation, its feoffee or feoffees, hold and retain the same, to be divested or dispossessed by the commonwealth, by due course of law. The plain interpretation of this statute is, that until the claim to a forfeiture is asserted by the state, the land is held subject to be divested by due course of law, instituted by the commonwealth alone, and for its own use. . . . *Id.*
7. The supreme court of Pennsylvania having decided, that a corporation has, in that state, a right to purchase, hold and convey land, until some act is done by the government, according to its own laws, to vest the estate in itself, the estate may remain in a corporation so purchasing or holding lands; but the estate is defeasible by the commonwealth. This being the law of Pennsylvania, it must govern in a case where land in Pennsylvania had been purchased by a corporation, created by the legislature of New York, for the purpose of supplying coal from Pennsylvania to the city of New York. *Id.*
8. In the case of the Bank of Augusta *v. Earle*, 13 Pet. 584, and in various other cases decided in the supreme court, a corporation is considered an artificial being, existing only in contemplation of law; and being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. Corporations created by statute must depend for their powers, and the mode of exercising them, upon the true construction of the statute. *Id.*
9. A corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law, and by force of the law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty; but although it may live and have its being in that state only, yet it does not follow, that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. The corporation must show that the law of its creation gave it authority to make such contracts; yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made; it is sufficient, that its existence, as an artificial person, in the state of its creation, is acknowledged and recognised by the state or nation where the dealing takes place; and that it is permitted by the laws of that place to exercise the powers with which it is endowed. *Id.*
10. Every power which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; a corporation can make no valid contract, without the sanction, express or implied, of such sovereignty; unless a case should be presented in which the right claimed by the corporation should appear to be secured by the constitution of the United States. *Id.*

CRIMES.

See PERJURY.

DAMAGES.

See FACTOR.

DEED.

1. A deed was executed in Glasgow, Scotland, by which land in Ohio, which had been pat-

ented to David Buchanan by the United States, was conveyed to Walter Sterling; the deed recited, that it was made in pursuance of a decree of the circuit court of the United States for the district of Virginia; no exemplification of the decree was offered in evidence, in support of the deed. The court held, that as Buchanan was the patentee of the land, although he made the deed in pursuance of a decree of the circuit court of Virginia, the decree could add nothing to the validity of the conveyance; and therefore, it was wholly unnecessary to produce an exemplification of the decree; the deed was good without the decree. *Games v. Dunn*.....*322

2. The possession of a deed, regularly executed, is *prima facie* evidence of its delivery; under ordinary circumstances, no other evidence of the delivery of a deed than the possession of it, by the person claiming under it, is required.....*Id.*
3. A deed was executed by David Carrick Buchanan, stating that he was the same person who was formerly David Buchanan, the patentee of land in Ohio; the court held, that this was *prima facie* evidence of the fact alleged; the law knows but one Christian name; and the omission and insertion of the middle name, or of the initial letter of that name, is immaterial; and it is competent for the party to show, that he is known by the one, as well as by the other. *Id.*

DEED OF TRUST.

1. In case of a deed of trust, executed to secure a debt, unless in case of some extrinsic matter of equity, a court of equity never interferes to delay or prevent a sale according to the terms of the trust; and the only right of the grantor in the deed, is the right to any surplus which may remain of the money for which the property was sold. *Bank of the Metropolis v. Gutschlick*.....*19

DISTRICT OF COLUMBIA.

1. The county of Alexandria, in the district of Columbia, cannot be regarded as standing in the same relation to the county of Washington that the states of the Union stand in relation to one another. *Bank of Alexandria v. Dyer*.....*141

See EXECUTORS AND ADMINISTRATORS, 8: LIMITATION OF ACTIONS.

DUTIES.

See PERJURY.

EJECTMENT.

1. In an action of ejectment, the defendants having entered into the consent rule, the plaintiff, in Ohio, is not to be called upon to prove the calls of the patent under which he claims, on the ground of establishing the different corners; the defendants are bound to admit, after they have entered into the consent rule, that they are in possession of the premises claimed by the lessor of the plaintiff. *Games v. Dunn*.....*322

See PRACTICE.

ERROR.

See WRIT OF ERROR.

EVIDENCE.

1. The proceedings in an action against the indorser of a note, by the holder, which gave to a trustee, by the terms of the deed of trust, a right to sell property held for the indemnity of the indorser, were proper evidence in an action on a contract for the sale of the lot, from which the party who had purchased under another title had been evicted by a title obtained under the deed of trust. No exceptions to the regularity of the proceedings offered in evidence can be taken, which should have been properly made in the original action by the party sued on the same. *Bank of the Metropolis v. Gutschlick*.....*19
2. Whether evidence be admissible or not, is a question for the court to decide; but whether it be sufficient or not to support the issue, is a question for the jury; the only case in which the court can make inferences from evidence, and pass upon its sufficiency, is on a demurrer to evidence.....*Id.*
3. When the deeds of the defendant in ejectment have been referred to by the plaintiff, for the sole purpose of showing that both parties claim under the same person; this does not prevent the plaintiff impeaching the deeds afterwards for fraud. *Remington v. Linthicum*.....*84
4. *Prima facie* evidence of a fact, is such, as in judgment of law is sufficient to establish the fact, and if not rebutted, remains sufficient for evidence of it. *United States v. Wiggins*.....*334
5. The rule is, that secondary or inferior shall not be substituted for evidence of a higher nature which the case submits of; the reason of that rule is, that an attempt to substitute the inferior for the higher, implies that the higher would give a different aspect to the case of the party introducing the lesser;

- "the ground of the rule is a suspicion of fraud." But before the rule is applied, the nature of the case must be considered, the nature of the case must be considered, to make a right application of it; and if it shall be seen, that the fact to be proved is an act of the defendant, which, from its nature, can be concealed from all others except him whose co-operation was necessary before the act could be complete; then the admissions and declarations of the defendant, either in writing, or to others, in relation to the act, become evidence. *United States v. Wood*. *431
6. It is certainly true, as a general rule, that the interpretation of written instruments properly belongs to the court, and not to the jury; but there are cases in which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury, for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects, and intentions, and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed. *Brown v. McGran*. *479
7. It is incumbent on those who seek to show that the examination of a witness has been improperly rejected, to establish their right to have the evidence admitted; for the court will be presumed to have acted correctly, until the contrary is established. *Philadelphia & Trenton Railroad Company v. Stimpson*. *448
8. To entitle a party to examine a witness in a patent cause, the purpose of whose testimony is to disprove the right of the patentee to the invention, by showing its use prior to the patent, by others, the provisions of the patent act of 1836, relative to notice, must be strictly complied with. *Id.*
9. It is incumbent on those who insist upon the right to put particular questions to a witness, to establish that right beyond any reasonable doubt, for the very purpose stated by them; and they are not afterwards at liberty to desert that purpose, and to show the pertinency or relevancy of the evidence for any other purpose not then suggested to the court. *Id.*
10. A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him on other matters, he must do so by making the witness his own; and calling him as such, in the subsequent progress of the cause. A party cannot, by his own omission to take an objection to the admission of improper evidence, brought out on a cross-examination, found a right to introduce testimony in chief, to rebut it or explain it. *Id.*
11. Parol evidence, bearing upon written contracts and papers, ought not to be admitted in evidence, without the production of such written contracts or papers; so as to enable both the court and the jury to see, whether or not the admission of the parol evidence, in any manner, will trench upon the rule that parol evidence is not admissible to vary or contradict written contracts or papers. *Id.*
12. As a general rule, and upon general principles, the declarations and conversations of the plaintiff are not admissible evidence in favor of his own rights; this is, however, but a general rule, and admits and requires various exceptions. There are many cases in which a party may show his declarations comport with acts in his own favor, as a part of the *res gestæ*; there are other cases in which his material declarations have been admitted. *Id.*
13. In an action for an assault and battery and wounding, the declarations of the plaintiff to his internal pains, aches, injuries and symptoms, to the physician attending him, are admissible, for the purpose of showing the nature and extent of the injuries done to him. In many cases of inventions, it is hardly possible in any other manner to ascertain the precise time and exact origin of the invention. . . . *Id.*
14. The conversations and declarations of a patentee, merely affirming that, at some former period, he had invented a particular machine, may well be objected to; but his conversations and declarations, stating that he had made an invention, and describing its details, and explaining its operations, are properly deemed an assertion of his right, at that time, as an inventor, to the extent of the facts and details which he then makes known, although not of their existence at an anterior time. Such declarations, coupled with a description of the nature and objects of the invention, are to be deemed a part of the *res gestæ*, and legitimate evidence that the invention was then known and claimed by him; and thus its origin may be fixed at least as early as that period. *Id.*
15. If the rejection of evidence is a matter resting in the sound discretion of the court, it cannot be assigned as error. *Id.*
16. Testimony was not offered by a defendant, or stated by him as matter of defence, in the stage of the cause when it is usually introduced according to the practice of the court; it was offered, after the defendant's counsel

had stated, in open court, that they had closed their evidence; and after the plaintiff, in consequence of that declaration, had discharged his own witness. The circuit court refused to admit the testimony; *Held*, that this decision was proper. *Id.*

17. A deed was executed in Glasgow, Scotland, by which land in Ohio, which had been patented by the United States to David Buchanan, was conveyed to Walter Sterling; the deed recited that it was made in pursuance of a decree of the circuit court of the United States for the district of Virginia; no exemplification of the decree was offered in support of the deed. The court held, that as Buchanan was the patentee of the land, although he made the deed in pursuance of the decree of the circuit court of Virginia, the decree could add nothing to the validity of the conveyance, and therefore, it was wholly unnecessary to produce an exemplification of the decree; the deed was good without the decree. *Games v. Dunn*. *322
18. The possession of a deed, regularly executed, is *prima facie* evidence of its delivery; under ordinary circumstances no other evidence of the delivery of a deed than the possession of it, by the person claiming under it is required. *Id.*
19. The recital in a deed, by the grantor, that he, David Carrick Buchanan, was the patentee of the land conveyed under the name of David Buchanan, is *prima facie* evidence of the fact stated. The law knows but one Christian name, and the omission, or insertion of the middle name, or of the initial letter of that name, is immaterial; and it is competent for the party to show that he is known as well without as with the middle name. *Id.*

See PAROL EVIDENCE: SALES FOR TAXES, 2.

EXCHANGE.

1. A paper was executed by R. R. K., of New Orleans, stating that the grantor, for and in consideration of a certain lot of ground (describing it), conveyed and transferred unto J. B. and S. B., all his right, title and interest in a certain tract or parcel of land (describing it), hereby warranting and defending unto the said J. B. and S. B., all his right and title in the same, and unto all persons claiming under them. The paper, called under the laws of Louisiana "an act of sale," was signed by R. R. K., J. B. and S. B., and a notary of New Orleans; and was deposited in the office of the notary. This was not an "exchange of property," according to the laws of Louisiana; and J. B. and

S. B. did not, by accepting the transfer of property made by the same, and signing the paper, incur the two obligations imposed on all vendors by the civil code of Louisiana, that of delivering and that of warranting the lot of ground sold to R. R. K.; and did not thereby become liable for the value of the property stated in the said "act of sale" to have been given for the property conveyed thereby. *Preston v. Keene*. *133

2. Exchange, according to the civil code of Louisiana, imports a reciprocal contract; which, by art. 1758 of that code, is declared, when the parties expressly enter into mutual agreements. *Id.*
3. An exchange is an executed contract; it operates, *per se*, as a reciprocal conveyance of the thing given and of the thing received. The thing given or taken in exchange must be specific, and so distinguishable from all other things of the like kind as to be clearly known and identified. Under the civil law of Louisiana, the exchanger who is evicted, has a choice either to sue for damages, or for the thing he gave in exchange; but he must first be evicted, before his cause of action can accrue. *Id.*

EXECUTIVE DEPARTMENTS.

See HEADS OF DEPARTMENTS, 1-5.

EXECUTORS AND ADMINISTRATORS.

1. Where there are two executors in a will, it is clear, that each has a right to receive the debts due to the estate, and all other assets which shall come into his hands; and he is answerable for the assets he receives; this responsibility results from the right to receive, and the nature of the trust. A payment of the sums received by him to his co-executor, will not discharge him from his liability to the estate; he is bound to account for all assets which come into his hands, and to appropriate them according to the directions of the will. *Edmonds v. Crenshaw*. *166
2. Executors are not liable to each other; but each is liable to the *cestus que trust* and devisees, to the full extent of the funds received by him. *Id.*
3. The removal of an executor from a state in which the will was proved, and in which letters-testamentary were granted, does not discharge him from his liability as executor; much less does it release him from his liability for assets received by him and paid over to his co-executor. *Id.*
4. Whatever property or money is lawfully recovered by the executor or administrator, after the death of his testator or intestate,

- in virtue of his representative character, he holds as assets of the estate; and he is liable therefor, in such representative character, to the party who has a good title thereto. The want of knowledge, or the possession of knowledge, on the part of the administrator, as to the rights and claims of other persons, upon the money thus received, cannot alter the rights of the party to whom it ultimately belongs. *De Valengin v. Duffy*..... *282
5. The owner of property or of money received by an administrator, may resort to the administrator, in his personal character, and charge him, *de bonis propriis*, with the amount thus received; he may do this, or proceed against him as executor or administrator, at his election. But whenever an executor or administrator, in his representative character, lawfully receives money or property, he may be compelled to respond to the party entitled, in that character; and will not be permitted to throw it off, after he has received the money, in order to defeat the plaintiffs' action..... *Id.*
 6. Letters-testamentary to the estate of Edward Coursault, a merchant who had died at Baltimore, were granted to Gabriel Paul, one of the executors named in the will; the other executor, Aglae Coursault, the wife of Edward Coursault, did not qualify as executrix, nor did she renounce the execution of the will. Afterwards, on the application of Aglae Coursault, stating she was executrix of Edward Coursault, accompanied with a power of attorney, given to her by Gabriel Paul, the qualified executor, who had removed to Missouri, the commissioners under the treaty of indemnity with France, awarded to the estate of Edward Coursault a sum of money, for the seizure and confiscation of the Good Friends and cargo, by the French government. During the pendency of the claim before the commissioners, Aglae Coursault died; and letters of administration, with the will annexed, were, on the oath of Thomas Dunlap, that the widow and executrix of Edward Coursault was dead, granted by the orphans' court of the county of Washington, in the district of Columbia, to the plaintiff in error, Elias Kane, a resident in Washington; the sum awarded by the commissioners was paid to Elias Kane, by the government of the United States. Gabriel Paul, the executor of Edward Coursault, brought an action against Elias Kane, for the money paid to him: *Held*, that he was entitled to recover the same; the letters-testamentary granted in Maryland, entitled the executors of Edward Coursault to recover, without his having the letters of administration granted by the orphans' court of Washington repealed or revoked. *Kane v. Paul*..... *33
 7. At common law, the appointment of an executor vests the whole personal estate in the person appointed executor, which he holds as trustee for the purposes of the will; and he holds the legal title in all the chattels of the testator; for the purpose of administering them, he is as much the proprietor of them as was the testator; the ordinary cannot transfer those chattels to any other person, by granting administration of them, *Id.*
 8. The act of congress of the 24th June 1812, gives to an executor or administrator, appointed in any state of the United States, or in the territories, a right to recover from any individual in the district of Columbia, effects or money belonging to the testator or the intestate, in whatever way the same may have been received; if the law does not permit him to retain it on account of some relations borne to the testator or to his executor, which defeats the rights of the executor or administrator; letters-testamentary or letters of administration obtained in either of the states or territories of the Union, give a right to the person having them to receive and give discharges for such assets, without suit, which may be in the hands of any person within the district of Columbia. The right to receive from the government of the United States, either in the district of Columbia, or in the state where letters have been granted, any sum of money which the government may owe to the testator or intestate, at the time of his death, or which may become due thereafter, or which may accrue to the government as trustee for a testator or intestate, in any way, or at any time, is given by that act. A *bonâ fide* payment of a debt to the administrator, which was due to the estate, is a legal discharge to the debtor, whether the administration be void or voidable..... *Id.*
 9. The certificate of the register of wills, annexed to the proceedings of the orphans' court of Maryland, granting letters-testamentary to the executor, showed, that the will had been proved, and that the letters-testamentary had been granted. This is proof that the person holding the letters-testamentary is executor, so far as the law requires it to be proved, in an action of *assumpsit*, upon a cause of action which arose in the time of the testator or of the executor. On the plea of the general issue, in such an action, and even in a case where that plea raises the question of right of title in the executor, the certificate of probate and qualification meets the requisition. A

judicial examination into their validity can only be gone into upon a plea in abatement, after *oyer* has been craved and granted; and then, upon issue joined, the plaintiff's title, as executor or administrator, may be disputed, by showing any of those causes which make the grant void *ab initio*, or that the administration had been revoked. *Id.*

10. The declaration, in an action by an executor, for the recovery of money received by the defendant, after the decease of the testator, may be in the name of the plaintiff, as executor, or in his own name, without stating that he is executor. The distinction is, that when an executor sues on a cause of action which occurred in the lifetime of his testator, he must declare in the *detinet*, that is, in his representative capacity only; but when the cause of action accrues after the death of the testator, if the money, when recovered, will be assets, the executor may declare in his representative character, or in his own name. *Id.*

FACTOR.

1. In the case of a factor who sells the goods of his principal in his own name, upon a credit, and dies before the money is received, if it is afterwards paid to the administrator, in his representative character, the creditor would be entitled to consider it as assets in his hands; and to charge him in the same character in which he received it. The debtor, that is to say, the party who purchased from the factor, without any knowledge of the true owner, and who paid the money to the administrator, under the belief that the goods belonged to the factor, is unquestionably discharged by this payment; yet he cannot be discharged, unless he pays it to one lawfully authorized to receive it, except only in his representative character. *De Valengin v. Duffy*. *282
2. An action was instituted against the consignees of two hundred bales of cotton, shipped by the direction of the owner to Liverpool, on which the owner had received an advance, by an acceptance of his bills on New York; which acceptance was paid by bills drawn on the consignees of the cotton in Liverpool; some time after the shipment of the cotton, the owner wrote to the consignees in Liverpool, expressing his "wishes" that the cotton should not be sold until they should hear further from him; in answer to this letter, the consignees said, "your wishes in respect to the cotton are noted accordingly." No other provision than from the sale of the cotton for the payment of the advance, was made by the consignor, when

the same was shipped; and no instructions for its reservation from the sale were given, when the shipment was made. Immediately after the acceptance of the bill drawn against the cotton, on the consignees in Liverpool, they sold the same for a profit of about ten per cent. on the shipment; cotton rose in price in Liverpool to more than fifty per cent. profit on the invoice, between the acceptance of the bill of exchange, and the arrival of the same at maturity. The shipper instituted an action against the consignees for the recovery of the difference between the actual sales and the sum the same would have brought had it been sold at the subsequent high prices at Liverpool. *Brown v. McGran*. . . . *479

3. There can be no reasonable doubt, that in particular circumstances, a wish expressed by a consignor to a factor, may amount to a positive command. *Id.*
4. In the case of a simple consignment of goods, without any interest in the consignee, or any advance or liability incurred on account thereof, the wishes of the consignor may fairly be presumed to be orders; and the "noting the wishes accordingly," by the consignees, an assent to follow them. But very different considerations apply, where the consignee is one clothed with a special interest and a special property, founded upon advances and liabilities. *Id.*
5. Whenever a consignment is made to a factor, for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made, or liabilities incurred, on account thereof; and the factor is bound to obey his orders; this arises from the ordinary relation of principal and agent. If, however the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property in the goods, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances, or meet such liabilities; unless there be some agreement between himself and the consignor which contracts or varies this right. . . . *Id.*
6. If, contemporaneously with the consignment, and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold, before a fixed time, in such a case, the consignment is presumed to be received subject to such order; and the factor is not at liberty to sell the goods to reimburse his advances, until after that time has elapsed. So, when orders are given, not to sell below a fixed price; unless the consignor shall, after due notice and request, refuse to provide other means to reimburse the factor.

In no case, will the factor be at liberty to sell the consignment, contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon; if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. *Id.*

7. When a consignment is made generally, without any specific orders as to the time and mode of sales, and the factor makes advances or incurs liabilities on the footing of such consignment, the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors, to sell, in the exercise of a sound discretion, at such time and in such manner as the usage of trade and his general duty require, and to reimburse himself for his liabilities, out of the proceeds of the sale; and the consignor has no right, by any subsequent orders, given after advances have been made, or liabilities incurred by the factor, to suspend or control this right of sale; except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities. *Id.*
8. If a sale of cotton, in Liverpool, by a factor, has been made on a particular day, tortiously, and against the orders of the owner, the owner has a right to claim damages for the value of the cotton, on the day the sale was made, as for a tortious conversion. If the sale of the cotton by the factor was authorized on a subsequent day, and the cotton has been sold against orders, before that day, the damages to which the owner may be entitled will be regulated by the price of cotton on that day. But the rate of damages is not to be obtained from the prices of cotton at any time between the day when the cotton was sold, against the orders of the owner, and the day on which the sale was authorized by him. *Id.*

FLORIDA LAND-CLAIMS.

1. A grant of land by Estrada, the governor of East Florida, was made on the 1st of August 1815, to Elizabeth Wiggins, on her petition, stating, that "owing to the diminution of trade, she will have to devote herself to the pursuits of the country;" the grant was made for the quantity of land apportioned by the regulations of East Florida, to the number of the family of the grantee; it was regularly surveyed by the surveyor-general, according to the petition and grant; no settlement or improvement was ever made by the grantee, nor by any one acting for her, *or* the property. In 1831, Elizabeth Wiggins presented a petition to the superior court of

East Florida, praying for a confirmation of the grant; and in July 1838, the court gave a decree in favor of the claimant; on an appeal to the supreme court of the United States, the decree of the superior court of East Florida was reversed. The court held, that by the regulations established on the 25th November 1818, by Governor Cop-pinger, the grant had become void, because of the non-improvement, and the neglect to settle the land granted. *United States v. Wiggins.* *344

2. The existence of a foreign law, especially when unwritten, is a fact to be proved like any other, by appropriate evidence. *Id.*
3. A copy of a decree by the governor of East Florida, granting land to a petitioner, while Spain had possession of the territory, certified by the secretary of the government to have been faithfully made from the original in the secretary's office, is evidence in the courts of the United States. By the laws of Spain, prevailing in the province at that time, the secretary was the proper officer to give copies; and the law trusted him for this particular purpose, so far as he acted under its authority; the original was confined to the public office. *Id.*
4. The eighth article of the Florida treaty stipulates, that "grants of land made by Spain, in Florida, after the 24th of January 1818, shall be ratified and confirmed to the persons in possession of the land, to the same extent that the same grants would be valid, if the government of the territory had remained under the dominion of Spain. The government of the United States may take advantage of the non-performance of the conditions prescribed by the law relative to grants of land; if the treaty does not provide for the omission. *Id.*
5. In the cases of Arredondo, 6 Pet. 691, and Percheman, 7 *Ibid.* 51, it was held, that the words in the Florida treaty, "shall be ratified and confirmed," in reference to perfect titles, should be construed, "are" ratified and confirmed. The object of the court, in these cases, was, to exempt them from the operation of the eighth article, for that they were perfect titles by the laws of Spain when the treaty was made; and when the soil and sovereignty of Florida were ceded by the second article, private rights of property were, by implication, protected. By the law of nations, the rights to property are secured, when territories are ceded; and to reconcile the eighth article of the treaty with the law of nations, the Spanish side of the article was referred to in aid of the American side. The court held, that perfect titles "stood confirmed" by the treaty; and must be so

- recognised by the United States, in our courts. *Id.*
6. Perfect titles to lands, made by Spain, in the territory of Florida, before the 24th January 1818, are intrinsically valid, and exempt from the provision of the eighth article of the treaty: and they need no sanction from the legislative or judicial departments of the United States. *Id.*
7. The eighth article of the Florida treaty was intended to apply to claims to land, whose validity depended on the performance of conditions, in consideration of which the concessions had been made; and which must have been performed before Spain was bound to perfect the titles. The United States were bound, after the cession of the country, to the same extent that Spain had been bound before the ratification of the treaty, to perfect them by legislation and adjudication. *Id.*
8. A grant of land by the government of Florida, made before the cession of Florida to the United States by Spain, confirmed: every point involved in the case having been conclusively settled by the court in their former adjudications in similar cases. *United States v. Waterman*. *478

FRAUD.

1. If there be any one ground upon which a court of equity affords relief, it is an allegation of fraud, proved or admitted. *Atkins v. Dick*. *114
2. Courts of equity will permit independent agreements which go to show a deed, on its face absolute, was intended only as a mortgage, to be set up against the express terms of the deed, only on the ground of fraud; considering it a fraudulent attempt in the mortgagee, contrary to his own express agreement, to convert a mortgage into an absolute deed. It is equally a fraud on the part of a debtor, to attempt to convert his contract as principal, into that of a surety only. *Sprigg v. Bank of Mount Pleasant*. *201

HABEAS CORPUS.

See *Holmes v. Jennison*, *540.

HEADS OF DEPARTMENTS.

1. On the 3d of March 1837, congress passed an act giving to the widow of any officer who had died in the naval service of the United States, authority to receive, out of the navy pension fund, half the monthly pay to which the deceased officer would have been entitled under the acts regulating the pay in the

navy, in force on the 1st day of January 1835. On the same day, a resolution was adopted by congress, giving to Mrs. Decatur, widow of Captain Stephen Decatur, a pension for five years, out of the navy pension fund, and in conformity with the act of 30th June 1834, and the arrearages of the half-pay of a post-captain, from the death of Commodore Decatur, to the 30th June 1834; the arrearages to be invested in trust for her, by the secretary of the treasury. The pension and arrearages, under the act of 3d March 1837, were paid to Mrs. Decatur, on her application to Mr. Dickerson, the secretary of the navy, under a protest by her, that by receiving the same she did not prejudice her claim under the resolution of the same date; she applied to the secretary of the navy, for the pension and arrears, under the resolution, which were refused by him; afterwards, she applied to Mr. Spaulding, who succeeded Mr. Dickerson as secretary of the navy, for the pension and arrears, which were refused by him. The circuit court of the county of Washington, in the district of Columbia, refused to grant a *mandamus* to the secretary of the navy, commanding him to pay the arrears, and to allow the pension under the resolution of March 3d, 1837: *Held*, that the judgment of the circuit court was correct. *Decatur v. Paulding*. *497

2. In the case of *Kendall v. United States*, 12 Pet. 527, it was decided by the supreme court, that the circuit court for Washington county, in the district of Columbia, had the power to issue a *mandamus* to an officer of the federal government, commanding him to do a ministerial act. *Id.*
3. In general, the official duties of the head of one of the executive departments, whether imposed by act of congress or by resolution, are not mere ministerial duties; the head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; he must exercise his judgment in expounding the laws and resolutions of congress, under which he is, from time to time, required to act; if he doubts, he has a right to call on the attorney-general to assist him with his counsel; and it would be difficult to imagine, why a legal adviser was provided by law for the heads of departments, as well as for the president, unless their duties were regarded as executive, in which judgment and discretion were to be exercised. *Id.*
4. If a suit should come before the supreme court, which involved the construction of any of the laws imposing duties on the heads of the executive departments, the court certainly

would not be bound to adopt the construction given by the head of a department; and if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But the judgment of the court upon the construction of a law, must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment, in any case where the law authorized him to exercise his discretion or judgment; nor can it, by *mandamus*, act directly upon the officer, or guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. The interference of the court with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and this power was never intended to be given to them. . *Id.*

5. The principles stated and decided in the case of *Kendall v. United States*, 12 Pet. 610, 614, relative to the exercise of jurisdiction by the circuit court of the district of Columbia, where the acts of officers of the executive departments of the United States may be inquired into for the purpose of directing a *mandamus* to such officers, affirmed..... *Id.*

ILLEGITIMACY.

See LOCAL LAW, 5-7.

INDIAN TITLE.

See NORTH CAROLINA LAND TITLES, 1, 2.

INJUNCTION.

1. A bill for an injunction was filed, alleging that the parties who had obtained a judgment at law for the amount of the bill of exchange, of which the complainant was indorser, had, before the suit was instituted, obtained payment of the bill from a subsequent indorser, out of the funds of the drawer of the bill, obtained by the subsequent indorser from one of the drawees. It was held, that it was not necessary to make the subsequent indorser, who was alleged to have made the payment, a party to the injunction bill. *Atkins v. Dick*..... *114
2. In such a bill, an allegation that the amount due on the bill of exchange was paid, is sufficient; without stating the value or nature

of the effects out of which the payment was made..... *Id.*

INSOLVENT LAWS.

1. The constitutional and legal rights of a citizen of the United States, to sue in the circuit courts of the United States, do not permit an act of insolvency, completely executed under the authority of a state, to be a good bar against a recovery upon a contract made in another state. *Suydam v. Broadnax*..... *67

INSURANCE.

1. Insurance was made, to the amount of \$8000, on the ship *Paragon*, for one year; the policy contained the usual risks, and, among others, that of the perils of the sea; the assured claimed for a loss by collision with another vessel, without any fault of the master or crew of the *Paragon*; and also insisted on a general average and contribution. The *Paragon* was in part insured; and in November 1836, in the year during which the policy was in operation, she sailed from Hamburg, in ballast, for Gottenburg, for a cargo of iron, for the United States; while proceeding down the Elbe, with a pilot on board, she came in contact with a galliot, and sank her; she lost her bow sprit, jib-boom and anchor, and was otherwise damaged, and put into Cuxhaven, a port at the mouth of the Elbe, and in the jurisdiction of Hamburg. The captain of the galliot libelled the *Paragon*, alleging that the loss of his vessel was caused by the carelessness or fault of those on board the *Paragon*; upon the hearing of the cause, the court decided, that the collision was not the result of the fault or carelessness of either side; and that, therefore, according to the marine law of Hamburg, the loss was a general average loss, and to be borne equally by both parties; that is, that the *Paragon* was to bear one-half of the expense of her own repairs, and to pay one-half of the value of the galliot; and that the galliot was to bear the loss of the half of her own value, and to pay one-half of the repairs of the *Paragon*; the result of this decree was, that the *Paragon* was to pay \$2600, being one-half of the value of the galliot (\$3000), after deducting one-half of her own repairs, being \$400. The owners of the *Paragon*, having no funds in Hamburg, the master was obliged to raise the money on bottomry; there being no cargo on board the *Paragon*, and no freight earned, the *Paragon* was obliged to bear the

whole loss: *Held*, that the assured was entitled to recover. *Peters v. Warren Insurance Company*..... *99

2. A loss by collision, without any fault on either side, is a loss by the perils of the sea, within the protection of the policy of insurance; so far as the injury and repairs done to the Paragon itself extended, the underwriters were liable for all damages. *Id.*
3. The rule, that underwriters are liable only for losses arising from the proximate cause of the loss, and not for losses arising from a remote cause, not immediately connected with the peril, is correct, when it is understood and applied in its true sense; and as such, it has been repeatedly recognised in the supreme court *Id.*
4. The law of insurance, as a practical science, does not indulge in niceties; it seeks to administer justice according to the fair interpretation of the intention of the parties; and deems that to be a loss within the policy, which is a natural and necessary consequence of the peril insured against. *Id.*
5. If there be any commercial contract which, more than any other, requires the application of sound common sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance. *Id.*
6. It has been held by learned foreign writers on the law of insurance, that whenever the thing insured becomes by law directly chargeable with any expense, contribution or loss, in consequence of a particular peril; the law treats the peril, for all practical purposes, as the proximate cause of such expense, contribution or loss. This they hold, upon the general principles of law, applicable to the contract of insurance; in the opinion of the supreme court, this is the just sense and true interpretation of the contract. *Id.*
7. In all foreign voyages, the underwriters, necessarily, have it in contemplation that the vessel insured must, or at least may be, subjected to the operation of the laws of the foreign ports which are visited; those very laws may, in some cases, impose burdens, and in some cases, give benefits, different from our laws; and yet there are cases under policies of insurance, where it is admitted, the foreign law will govern the rights of the parties, and not the domestic law; such is the known case of general average, settled in a foreign port according to the local law, although it may differ from our own law. *Id.*

JAIL LIMITS.

See CONSTRUCTION OF UNITED STATES
STATUTES, 1-3.

JUDGMENT.

1. Where a deed of trust was executed to secure the payment of certain notes, and a judgment obtained on the notes, the judgment does not operate as an extinguishment of the right of the holders of the note to call for the execution of the trust; although the act of limitations might apply to the judgment. *Bank of the Metropolis v. Gutschlick*..... *19

See PRACTICE.

JURISDICTION.

1. The artificial being, a corporation aggregate, is not, as such, a citizen of the United States, yet the courts of the United States will look beyond the mere corporate character, to the individuals of whom it is composed; and if they were citizens from a different state than the party sued, they are competent to sue in the courts of the United States; but all the corporators must be citizens of a different state from the party sued. The same principle applies to the individuals composing a corporation aggregate, when standing in the attitude of defendants, which does when they are in that of plaintiffs. *Commercial and Railroad Bank v. Slocomb*..... *60
2. The act of congress, passed February 28th, 1839, entitled "an act in amendment of the acts representing the judicial system of the United States," did not contemplate a change in the jurisdiction of the courts of the United States, as regards the character of the parties, as prescribed by the judiciary act of 1789, as that act has been expounded by the supreme court of the United States: which is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued. *Id.*
3. The 11th section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit courts of the United States; and gives to the circuit courts "original cognisance, concurrent with the courts of the several states, of all suits of a civil nature, at common law and in equity." It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies co-extensive with that right; these remedies would not be so, if any proceedings under an act of state legislation, to which the plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court. *Suydam v. Broadnax*..... *67
4. An action was brought by foreign attach-

ment, in the court of common pleas of Warren county, Pennsylvania, in the name of a citizen of Pennsylvania, for the use of the Lumberman's Bank at Warren, Pennsylvania, against a citizen of New York; the suit was on a note given by the defendant to the plaintiff, to be paid "in the office-notes of the Lumberman's Bank at Warren;" some of the stockholders of the Lumberman's Bank at Warren were citizens of the state of New York. The defendant appeared to the action, by counsel, and having given bond with surety to the court of common pleas, removed the cause to the circuit court of the United States for the western district of Pennsylvania; a motion was made in the circuit court to remand the cause to the court of common pleas of Warren county, the circuit court having no jurisdiction of the cause, on the ground, that the real party in the suit was the Lumberman's Bank at Warren, an aggregate corporation, some of the stockholders of the bank being citizens of the state of New York. It was *held*, that the circuit court had jurisdiction of the case.

Irvine v. Lowry.....*293

5. The decisions of the supreme court have been uniform, and as declared at the present term in the case of the Commercial and Railroad Bank *v.* Slocomb, that the courts of the United States cannot exercise jurisdiction, when some of the stockholders in a corporation established in one state are citizens of another state, of which the party sued by the corporation is a citizen.*Id.*

6. Action of ejectment in the state court of Alabama, for a lot of ground in the city of Mobile; the plaintiff claimed the title to the lot, under an act of congress, and the decision of the state court was against the right and title so set up and claimed; a writ of error was prosecuted to the supreme court of Alabama. It was *held*, that this case was embraced by the 25th section of the judiciary act of 1789, which gives this court jurisdiction to revise the judgment of the state court in such cases. *Pollard's Heirs v. Kibbe* *353

7. In the state of Vermont, George Holmes was confined under a warrant, issued by the governor of that state, directing the sheriff of the county of Washington to "convey and deliver him to William Brown, the agent of Canada, or to such person or persons as, by the laws of said province, may be authorized to receive the same, at some convenient place, on the confines of this state, and of the said province of Lower Canada; to the end that the said George Holmes may be thence conveyed to the district of Quebec, and be there dealt with as to law and justice appertains." The warrant stated, that George

Holmes was in the custody of the sheriff, by reason of a charge of felony, sustained by indictment found by the grand jurors of the district of Quebec, in the province of Lower Canada; and that the said George Holmes, on the 31st day of January 1838, at the parish of St. Louis of Kamouraska, in the said district, did feloniously kill and murder one Louis Paschal Achille Tache; "And whereas, the said George Holmes not being a citizen of the state of Vermont, but a citizen of the said province of Lower Canada, and the offence whereof he stands charged as aforesaid, having been committed within the jurisdiction of the said province, it is fit and expedient, that he, the said George, be made amenable to the laws of the said province, for the offence aforesaid." A writ of *habeas corpus* was, on the petition of George Holmes, issued by the supreme court of Vermont; and on the return thereof by the sheriff, stating the warrant of the governor to be the cause of his detention, he was remanded by the court; Holmes prosecuted a writ of error to the supreme court of the United States. The writ of error was dismissed, the court being equally divided on the question, whether the supreme court had jurisdiction of this case. *Holmes v. Jennison*.....*540

LANDLORD AND TENANT.

1. It is a general rule, that a tenant shall not dispute his landlord's title; but this rule is subject to certain exceptions; if a tenant disclaims the tenure, and claims the fee in his own right, of which the landlord has notice, the relation of landlord and tenant is put an end to, and the tenant becomes a trespasser; and he is liable to be turned out of possession, though the period of his lease is not expired. *Walden v. Bodley*....*156
2. The same relation as that of landlord and tenant subsists between a trustee and a *cestui que trust*, as it regards the title.*Id.*

LAND TITLES.

See CONSTRUCTION OF UNITED STATES' STATUTES,
4-7: NORTH CAROLINA LAND TITLES.

LEAD MINES.

See PUBLIC LANDS.

LEASE.

1. The legal understanding of a lease for years, is a contract for the possession and profits of lands for a determinate period, with the recompense of rent; it is not necessary that

the rent should be in money ; if reserved in kind, it is rent, in contemplation of law. *United States v. Gratiot*. *526

LIMITATION OF ACTIONS.

1. An act was instituted by the Bank of Alexandria, in the county of Alexandria, against the defendants, residents in the county of Washington, in the same district, for money loaned ; the suit was brought in the county of Washington. The defendants pleaded the statute of limitations of Maryland, which prevails in that part of the district of Columbia, and which limits such actions to three years, from the date of the contract ; the plaintiff replied, that he was "beyond seas," claiming the benefit of the exception in the statute in favor of persons "beyond seas." *Bank of Alexandria v. Dyer*. . *141
2. The words "beyond seas," in the statute of limitations of Maryland, are manifestly borrowed from the English statute of limitations of James I., c. 21 ; and it has always been held, that they ought not to be interpreted according to their literal meaning ; but ought to be construed as equivalent to the words, "without the jurisdiction of the state." According to this interpretation, a person residing in another state of the Union was "beyond seas," within the meaning of the act of assembly ; and therefore, excepted from its operation, until he should come within the limits of Maryland. This statute is in force in Washington county, in the district of Columbia ; and this court will give it the same construction it has received in the courts of Maryland. *Id.*
3. The counties of Washington and Alexandria, together, constitute the territory of Columbia, and are united under one territorial government ; they have been formed by the acts of congress into one separate political community ; the counties which constitute it resemble different counties in the same state ; and do not stand towards one another in the relation of distinct and separate governments. Residents of the county of Alexandria were not "beyond seas," in respect to the county of Washington. *Id.*

LOCAL LAW.

1. A paper was executed by R. R. K., of the city of New Orleans, stating that the grantor, for and in consideration of, a certain lot or parcel of land (describing it), conveyed and transferred to J. B. and S. B., all his right, title and interest in a certain tract or parcel of land (describing it), hereby warranting and defending unto the said J. B. and S. B.,

- all his right and title in the same, and unto all persons claiming under them. The paper called under the laws of Louisiana, "an act of sale," was signed by R. R. K., J. B., S. B. and a notary of New Orleans ; and was deposited in the office of the notary. This was not "an exchange," according to the laws of Louisiana ; and J. B. and S. B. did not, by accepting the transfer of the property made by the same, and signing the paper, incur the two obligations imposed on all vendors by the civil code—that of delivering, and that of warranting, the lot of ground sold to R. R. K. ; and did not thereby become liable for the value of the property stated in the said "act of sale" to have been given for the property conveyed thereby. *Preston v. Keene*. *138
2. Exchange, according to the civil code of Louisiana, imports a reciprocal contract ; which, by art. 1758 of that code, is declared to be a contract where the parties expressly enter into mutual agreements. *Id.*
 3. An exchange is an executed contract ; it operates, *per se*, as a reciprocal conveyance of the thing given, and of the thing received. The thing given or taken in exchange must be specific, and so distinguishable from all things of the like kind as to be clearly known and identified. Under the civil code of Louisiana, the exchanger who is evicted, has a choice either to sue for damages, or for the thing he gave in exchange ; but he must first be evicted, before his cause of action can accrue. *Id.*
 4. Construction of the act of the legislature of Maryland, passed December session 1825, entitled "an act relating to illegitimate children," which provides, that "the illegitimate child or children of any female, and the issue of any such child or children," are declared capable in law "to take and inherit both real and personal estate from their mother and from each other, and from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock." *Brewer v. Blougher*. *178
 5. J. S., who had several children, who were the children of an incestuous connection, conveyed a tract of land in the state of Maryland to one of those children ; the grantee died intestate and without issue, seised in fee of the land ; two brothers and one sister of this incestuous intercourse survived him ; *Held*, that under the act of Maryland, "relating to illegitimate children," they inherited the estate of their deceased brother. . . . *Id.*
 6. It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates ; and to

restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it. According to the principles of the common law, an illegitimate child is *filius nullius*, and can have no father known to the law; and when the legislature speaks, in general terms, of children of that description, without making any exceptions, the court is bound to suppose they design to include the whole class... *Id.*

LOUISIANA.

See CONSTRUCTION OF UNITED STATES
STATUTES, 4-7.

MANDAMUS.

1. On the 3d of March 1837, congress passed an act giving to the widow of any officer who had died in the naval service of the United States, authority to receive, out of the navy pension fund, half the monthly pay to which the deceased officer would have been entitled, under the acts regulating the pay in the navy, in force on the 1st day of January 1835. On the same day, a resolution was adopted by congress, giving to Mrs. Decatur, widow of Captain Stephen Decatur, a pension for five years, out of the navy pension fund, and in conformity with the act of 30th June 1834, and the arrearages of the half-pay of a post-captain, from the death of Commodore Decatur to the 30th June 1834; the arrearages to be vested in trust for her by the secretary of the treasury. The pension and arrearages, under the act of 3d March 1837, were paid to Mrs. Decatur, on her application to Mr. Dickerson, the secretary of the navy, under a protest by her, that by receiving the same, she did not prejudice her claim under the resolution of the same date; she applied to the secretary of the navy for the pension and arrears, under the resolution, which were refused by him; afterwards, she applied to Mr. Paulding, who succeeded Mr. Dickerson as secretary of the navy, for the pension and arrears, which were refused by him. The circuit court of the county of Washington, in the district of Columbia, refused to grant a *mandamus* to the secretary of the navy, commanding him to pay the arrears, and to allow the pension under the resolution of March 3d 1837: *Held*, that the judgment of the circuit court was correct. *Decatur v. Paulding*.....*497
2. In the case of *Kendall v. United States*, 12 Pet. 544, it was decided by the supreme court, that the circuit court for Washington

county, in the district of Columbia, had the power to issue a *mandamus* to an officer of the federal government, commanding him to do a ministerial act.... *Id.*

See HEADS OF DEPARTMENTS.

MANDATE.

1. The mandate of the supreme court to the circuit court must be its guide in executing the judgment or decree on which it issued; the mandate is the judgment of the supreme court, transmitted to the circuit court; and where the direction contained in it is precise and unambiguous, it is the duty of the circuit court to carry it into execution, and not to look elsewhere for authority to change its meaning. But when the circuit court are referred to testimony to ascertain the amount to be decreed, and are authorized to take more evidence on the point, it may sometimes happen, that there will be some uncertainty and ambiguity in the mandate; and in such a case, the court below have, unquestionably, the right to resort to the opinion of the supreme court, delivered at the time of the decree, in order to assist them in expounding it. *West v. Brashear*....*51

MARSHALS' AND SHERIFFS' SALES.

1. A sale of land by the sheriff, under the laws of Maryland, seized under a *feri facias*, transfers the legal estate to the vendee, by operation of law, and does not require a sheriff's deed to give it validity; but as sheriffs' sales of lands are within the statute of frauds, some memorandum in writing of the sales is required to be made. It is immaterial, when the return to the execution is made, provided it is before the recovery in an ejectment for the land sold, as the sale must be proved by written evidence; the sale passes the title, and the vendee takes it from the day of the sale; the evidence may, therefore, be procured, before or at the trial. *Remington v. Linthicum*.....*84
2. If property is seized under a *feri facias*, before the return-day of the writ, the marshal may proceed to sell, at any time afterwards, without any new process from the court; as a special return on the *feri facias* is one of the necessary modes of proving the sale, the marshal must be authorized to make the indorsement after the regular return-term, in case where the sale was made afterwards..... *Id.*
3. The return to a *feri facias*, if written on the writ, should be so full as to contain the name of the purchaser, and the price paid

for the property, or it would not be a sufficient memorandum of the sale, within the statute of frauds; nor can an imperfect return of a sale be made complete, by a reference to the private memorandum-book kept by the marshal of his sales; as it was not a sufficient memorandum of a sale, within the statute. *Id.*

MASSACHUSETTS.

See BOUNDARIES OF STATES: CHANCERY AND
CHANCERY PRACTICE, 5-11:
SUPREME COURT.

NAMES.

- 1 The law knows of but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial; and it is competent for the party to show, that he is known as well without as with the middle name. *Games v. Dunn*..... *322

NORTH CAROLINA LAND TITLES.

1. Ejectment for 49,000 acres of land in the state of North Carolina, claimed by the plaintiffs, under a grant from the state, dated 20th July 1796, to William Cathcart, founded on entries made in the office of the entry-taker, in the county of Buncombe, in the state of North Carolina, after the 3d of February 1795, within the limits of the country. The land lay wholly within the limits of the territory specially described and set forth in the fifth section of the act of 1783, entitled an act for opening the land-office of the state of North Carolina. The claim of the plaintiffs in the ejectment was resisted, on the ground, that the grant under which the plaintiffs claimed, was, at the time of its emanation, wholly within the territory allotted to the Cherokee Indians, and was null and void; as such entries and grants were prohibited by the sixth section of the act. It was held, that the title under which the plaintiffs claimed, was invalid. *Latimer v. Poteet*..... *4
2. The Indian title being a right of occupancy, the state of North Carolina had the power to grant the fee in those lands, subject to this right..... *Id.*

PAROL EVIDENCE.

1. It is equally well settled in courts of equity, as in courts of law, as a rule of evidence, that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement; and this is

founded on the soundest principles of reason and policy, as well as authority. *Sprigg v. Bank of Mount Pleasant*..... *201

See EVIDENCE.

PARTIES.

See CORPORATIONS, 4: INJUNCTION: SPECIFIC
PERFORMANCE, 4.

PATENTS.

1. On the 26th September 1835, a second patent was granted, the original patent, granted in 1831, having been surrendered and cancelled on account of a defective specification; the second patent being for fourteen years from the date of the original patent; the second patent was in the precise form of the original, except the recital of the fact, that the former patent was cancelled, "on account of a defective specification," and the statement of the time the second patent was to begin to run. It was objected, that the second patent should not be admitted in evidence, on the trial of the case, because it did not contain any recitals that the pre-requisites of the act of congress of 1836, authorizing the renewal of patents, had been complied with: *Held*, that this objection could not, in point of law, be maintained. The patent was issued under the great seal of the United States, was signed by the president, and countersigned by the secretary of state; it is a presumption of law, that all public officers, and especially such high functionaries, perform their proper official duties, until the contrary is proved. Where an act is to be done, or patent granted, upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act, in granting the patent, is *primâ facie* evidence that the proofs have been regularly made, and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, when the law has made the officer the proper judge of their sufficiency and competency. *Philadelphia and Trenton Railroad Co. v. Stimpson* *448
2. Patents for lands, equally with patents for inventions, have, in courts of justice, been deemed *primâ facie* evidence that they have been regularly granted, whenever they have been produced under the great seal of the government, without any recitals or proofs that the pre-requisites of the acts under which they have been issued have been duly observed. In cases of patents, the United

- States have gone one step farther; and as the patentee is required to make oath that he is the true inventor, before he can obtain a patent, the patent has been deemed *prima facie* evidence that he has made the invention. *Id.*
3. To entitle a party to examine a witness, in a patent cause, the purpose of whose testimony is to disprove the right of the patentee to the invention, by showing its use by others, prior to the patent, the provisions of the patent act of 1836, relative to notice, must be strictly complied with. *Id.*
4. The conversations and declarations of a patentee, merely affirming that, at some former period, he had invented a machine, may well be objected to; but his conversations and declarations, stating that he had made an invention, and describing its details, and explaining its operations, are properly deemed an assertion of his right, at that time, as an inventor, to the extent of the facts and details which he then makes known, although not of their existence at an anterior time. Such declarations, coupled with a description of the nature and objects of the invention, are to be deemed a part of the *res gestæ*, and are legitimate evidence that the invention was then known and claimed by him; and thus its origin may be fixed, at least, as early as that period. *Id.*

PENAL STATUTES.

See CONSTRUCTION OF STATUTES: SLAVE TRADE.

PERJURY.

1. The defendant was indicted for perjury, in falsely taking and swearing "the owners' oath, in cases where goods have been actually purchased;" as prescribed by the fourth section of the supplementary collection law, of the first of March 1823; the perjury was charged to have been committed in April 1837, at the custom-house in New-York, on the importation of certain woollen goods in the ship Sheridan. The indictment charged the defendant with having intentionally suppressed the true cost of the goods, with intent to defraud the United States. 2. Charging the perjury in swearing to the truth of the invoice produced by him at the time of the entry of the goods, the invoice being false, &c. It appeared by the evidence, that the goods mentioned in the entry had been bought by the defendant from John Wood, his father, of Saddleworth, England; no witness was produced by the United States, to prove that the value or cost of the goods was greater than that for which they were entered at the custom-house in New York; the evidence of this, offered by the prosecution was, the invoice-book of John Wood, and thirty-five original letters from the defendant to John Wood, between 1834 and 1837, showing a combination between John Wood and the defendant, to defraud the United States, by invoicing and entering goods at less than their actual cost; that this combination comprehended the goods imported in the Sheridan; and that the goods received by that ship had been entered by the defendant, he knowing that they had cost more than the prices at which he had entered them. This evidence was objected to on the part of the defendant, as not competent proof to convict the defendant of the crime of perjury; and that if an inference of guilt could be derived from such proof, it was an inference from circumstances, not sufficient, as the best legal testimony, to warrant a conviction: *Held*, that in order to a conviction, it was not necessary, on the part of the prosecution, to produce a living witness; if the jury should believe, from the written testimony, that the defendant made a false and corrupt oath, when he entered the goods. *United States v. Wood* *430
2. The cases in which a living witness to the *corpus delicti* of the defendant, in a prosecution for perjury, may be dispensed with, are: All such where a person charged with a perjury by false swearing to a fact directly disproved by documentary or written testimony, springing from himself, with circumstances showing the corrupt intent: In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant, when he took the oath, the oath only being proved to have been taken: In cases where the party is charged with taking an oath, contrary to what he must necessarily have known to be the truth; and the false swearing can be proved by his own letters, relating to the fact sworn to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it. *Id.*
3. The letters of the defendant, showing his knowledge of the actual cost of the goods which had been falsely entered by him, are the best evidence which can be given; this evidence is good, under the general principle, that a man's own acts, conduct and declarations, when voluntary, are always admissible in evidence against him. If the letters of the defendant showed that the invoice-book of the vendor of the goods, containing an invoice of the goods enumerated in the invoice

to which the defendant had sworn the owners' oath, in which book the goods were priced higher in the sale of them to the defendant, recognised the book as containing the true invoice, his admission supersedes the necessity of other proof to establish the real price given by him for the goods; and the letters and invoice-book, in connection, preponderate against the oath taken by the defendant, making a living witness to the *corpus delicti* charged in the indictment, unnecessary.....*Id.*

PLEAS AND PLEADING.

1. Action on an agreement in writing, by which Gutschlick had purchased a lot of ground in the city of Washington, from the Bank of the Metropolis, for which he had paid a part of the purchase-money, and given a note for the residue; by the contract, the Bank of the Metropolis, through its president and cashier, was pledged to convey the lot in fee-simple to Gutschlick, when the whole purchase-money was paid. The declaration in each count averred the payment of the note, and the failure of the bank to convey; to three special counts in the declaration, there was no conclusion; to the fourth count, for money had and received, there was a general conclusion. It was held by the court, that whatever might have been the effect of the want of a conclusion to three counts, upon a special demurrer, the 32d section of the judiciary act of 1789 would cure the defect, if admitted to be one. *Bank of the Metropolis v. Gutschlick**19
2. An allegation that a party made, alleged, indorsed or delivered a bill of exchange is sufficient, although the defendant did not do either of those acts himself; provided he authorized the doing of them.*Id.*
3. An averment in a declaration set forth that the plaintiff had been turned out of possession of a lot of ground, but did not state that the eviction was by due course of law; the breach alleged in the count was, that the defendant had refused, on demand, to convey the lot. The court held the averment of eviction to be mere surplusage.*Id.*
4. The action was *assumpsit* against a bank on a contract, under the seals of the president and cashier: *Held*, that the action was well brought; it makes no difference, in an action of *assumpsit* against a corporation, whether the agent was appointed under the seal or not; or whether he puts his own seal to a contract which he makes in behalf of the corporation.*Id.*
5. An action was brought in the circuit court of Mississippi, against the Commercial and

Railroad Bank of Vicksburg, Mississippi, by parties who were citizens of the state of Louisiana; the defendants pleaded in abatement, by attorney, that they were an aggregate corporation, and that two of the stockholders resided in the state of Mississippi. The affidavit to the plea was sworn to by the cashier of the bank, before the "deputy-clerk;" it was not entitled as of any term of the court; the plaintiffs demurred to the plea: *Held*, that the appearance of the defendants in the circuit court, by attorney, was proper: and that if any exceptions existed to this form of the plea, they should have urged to the receiving of it, when it was offered, and were not cause of demurrer: *Held*, that the circuit court of Mississippi had no jurisdiction of the case. *Commercial and Railroad Bank v. Locomb**60

See ACTION, 2.

POLICY OF INSURANCE.

1. If there be any commercial contract which, more than any other, requires the application of sound common sense, and practical reasoning, in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance. *Peters v. Warren Insurance Company**99

POTOMAC COMPANY.

See CHESAPEAKE AND OHIO CANAL COMPANY.

PRACTICE.

1. In a *scire facias* to revive a judgment in ejectment, where it is stated, that the term recovered is yet unexpired, this is sufficient; it is not required, that the term as laid in the declaration, and that facts showing its continuance, should be stated. *Walden v. Craig**147
2. When the court have given leave, on motion, to extend the term in a demise, and the amendment is specific, it is not necessary to interline it in the declaration; if leave to amend the declaration had been given generally, and the amendments had not been interlined, it would be different*Id.*
3. In Kentucky, there is no law which limits a revival of judgments; and at law, lapse of time can only operate by way of evidence. From lapse of time, and favorable circumstances, the existence of a deed may be presumed, or that an obligation has been discharged; but this presumption always arises under pleadings which would render the facts presumed proper evidence. A demurrer to a *scire facias* raises only questions of law

on the facts stated in the writ of *scire facias*; no evidence is heard by the court on the demurrer; and consequently, there is no presumption against the judgment on which the writ issued, from lapse of time. . . . *Id.*

4. The marshal, in his return to a *scire facias* to revive a judgment in ejectment, stated, that two of the defendants were dead. This return does not become matter of record, like the fact of service of the writ, stated in the return, and cannot be taken advantage of by demurrer; a plea in abatement is the proper method of taking advantage of the decease of those of the defendants who were dead; on this plea, the plaintiff could have taken issue, and have had the facts ascertained by a jury. . . . *Id.*
5. To a *scire facias* to revive a judgment in ejectment, it is not necessary to make the executors or administrators of deceased defendants parties; the subject-matter in dispute being land, over which they have no control. The law is well settled, that where a defendant in ejectment dies, the judgment must be revived against both his heirs and the terre-tenants. . . . *Id.*
6. Service of process or notice is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken in a case in which there has been no process or notice, the proceeding is a nullity. But this is only where original jurisdiction is exercised; and not a decision of a collateral question, in a case where the parties are before the court. . . . *Id.*
7. After judgment, the parties are still in court, for all the purposes of giving effect to it; and in the action of ejectment, the court having power to extend the demise, after judgment, the defendant may be considered in court, on a motion to amend, as well as on any other motion or order which may be necessary to carry into effect the judgment. In no correct sense, is this power of amendment similar to the exercise of an original jurisdiction between parties on whom process has not been served. . . . *Id.*

PROCESS.

1. The statute of May 19th, 1828, entitled, "an act further to regulate process in the courts of the United States," which proposes only to regulate the mode of proceeding in civil suits, does not divest the public of any right, does not violate any principle of public policy, but on the contrary, makes provision in accordance with the policy which the government has indicated by many acts of previous legislation, to conform to state laws, in giving to persons imprisoned under

execution, the privilege of jail-limits, embracing executions at the suit of the United States. *United States v. Knight*. . . . *302

See PRACTICE, 1, 4-6.

PROMISSORY NOTES.

1. An action was instituted in the circuit court of Mississippi, on a promissory note, dated at and payable in New York; the declaration omitted to state the place at which the note was payable, and that a demand of payment had been made at that place. The court held, that to maintain an action against the drawer of a promissory note or bill of exchange, payable at a particular place, it is not necessary to aver in the declaration, that the note, when due, was presented at the place for payment, and was not paid; but the place of payment is a material part of the description of the note, and must be set out in the declaration. *Covington v. Comstock*. . . . *43
2. A note to be paid "in the office notes of a bank," is not negotiable by the usage or custom of merchants; not being a promissory note by the law-merchant, the statute of Anne, or the kindred act of assembly of Pennsylvania, it is not negotiable by indorsement; and not being under seal, it is not assignable by the act of assembly of Pennsylvania on that subject, relating to bonds. No suit could be brought upon it, in the name of the indorser; the legal interest in the instrument continues in the person in whose favor it has been drawn, whatever equity another may have to claim the sum due on the same; and he only is the party to a suit at law on the instrument. *Irvine v. Lowry*. . . . *293
3. Action on a promissory note for \$2000, made for the purpose of being discounted at the branch bank, at Mobile, payable to the cashier of the bank or bearer, and upon which was written an order to credit the person to whom the note was sent, to be by him offered for discount to the bank, for the use of the makers, the order being signed by all the makers of the note. The bank refused to discount the note, and it was marked with a pencil mark, in the manner in which notes are marked by the bank which are offered for discount. The agent of the makers, to whom the note was intrusted to be offered for discount, put it into circulation, after indorsing it; having disposed of it for \$1200, for his own benefit, without the knowledge of the makers; and communicated to the purchaser of the note, that it had been offered for discount and rejected

by the bank ; the note was afterwards given to other persons in part payment of a previous debt, and credit for the amount was given in the account with their debtors. The form of the note was that required by the bank when notes are discounted, and had not been used before it had been so required by the bank. The circuit court instructed the jury, that the plaintiff was not entitled to recover from the makers of the note : *Held*, that the instruction was correct. *Fowler v. Brantley*. *318

4. The known custom of the bank, and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, entered into the contract of those giving notes for the purpose of having them discounted at the bank ; and the parties to the note must be understood as having agreed to govern themselves by such customs and modes of doing business ; and this, whether they had actual knowledge of them or not ; it was the especial duty of all those dealing with the note to ascertain them, if unknown. This is the established doctrine of the supreme court, as laid down in *Renner v. Bank of Columbia*, 9 Wheat. 521 ; in *Mills v. Bank of the United States*, 11 Ibid. 431 ; and in the *Bank of Washington v. Triplett*, 1 Pet. 32. *Id.*

5. A note over-due, or a bill dishonored, are circumstances of suspicion, to put those dealing for it afterwards on their guard ; and in whose hands it is open to the same defences it was in the hands of the holder, when it fell due ; after maturity, such paper cannot be negotiated. *Id.*

PUBLIC LANDS.

1. The United States instituted an action on a bond given by the defendants, conditioned that certain of the obligors, who had taken from the agent of the United States, under the authority of the president of the United States, a license for smelting lead-ore, bearing date September 1st, 1834, should fully execute and comply with the terms and conditions of a license for purchasing and smelting lead-ore, at the United States' lead-mines, on the upper Mississippi river, in the state of Illinois, for the period of one year. The defendants demurred to the declaration, and the question was presented to the circuit court of Illinois, whether the president of the United States had power, under the act of congress of 3d of March 1807, to make a contract for purchasing and smelting lead-ore, at the lead-mines of the United States, on the Upper Mississippi ; this question was certified from the circuit to the supreme court

of the United States : *Held*, that the president of the United States had power, under the act of congress of 3d of March 1807, to make the contract on which this suit was instituted. *United States v. Gratiot*. *529

2. The power over the public lands is vested in congress by the constitution, without limitation, and has been considered the foundation on which the territorial governments rest. *Id.*

3. The words "dispose of" the public lands, used in the constitution of the United States, cannot, under the decisions of the supreme court, receive any other construction than that congress has the power, in its discretion, to authorize the leasing of the lead-mines on the public lands, in the territories of the United States. There can be no apprehension of any encroachments upon state rights, by the creation of a numerous tenantry within the borders of the states, from the adoption of such measures. *Id.*

4. The authority given to the president of the United States, to lease the lead-mines, is limited to a term not exceeding five years ; this limitation, however, is not to be construed as a prohibition to renew the leases, from time to time, if he thinks proper so to do. The authority is limited to a short period, so as not to interfere with the power of congress, to make other dispositions of the mines, should they think the same necessary. *Id.*

5. The legal understanding of a lease for years, is a contract for the possession and profits of land for a determinate period, with the recompense of rent ; it is not necessary that the rent should be in money ; if reserved in kind, it is rent, in contemplation of law. . *Id.*

6. The law of 1807, authorizing the leasing of the lead-mines, was passed, before Illinois was organized as a state ; she cannot now complain of any disposition or regulation of the lead-mines, previously made by congress ; she surely cannot claim a right to the public lands, within her limits. *Id.*

RHODE ISLAND.

See BOUNDARIES OF STATES : CHANCERY AND
CHANCERY PRACTICE, 5-11 :
• SUPREME COURT.

SALES OF REAL ESTATE.

1. The rule that the purchaser of property shall prepare and tender a deed of conveyance of the property to the vendor, to be executed by him, although prevailing in England, does not seem to have been adopted in some of the states of the United States ; in Ohio, the rule does not prevail. The local practice

ought certainly to prevail, and to constitute the proper guide in the interpretation of the terms of a contract. *Taylor v. Longworth*..... *172

SALES FOR TAXES.

1. The supreme court of Ohio has required a claimant under a tax-title to show, before his title can be available, a substantial compliance with the requisites of the law. *Games v. Dunn*..... *322
2. A deed of lands sold for taxes cannot be read in evidence, without proof that the requisites of the law which subjected the land to taxes had been complied with; there can be no class of laws more strictly local in their character, and which more directly concern real property, than laws imposing taxes on lands, and subjecting the lands to sale for unpaid taxes; they not only constitute a rule of property, but their construction by the courts of the state should be followed by the courts of the United States, with equal, if not with greater, strictness than any other class of laws..... *Id.*

SCIRE FACIAS.

See PRACTICE.

SECRETARY OF THE NAVY.

See HEADS OF DEPARTMENTS.

SLAVE-TRADE.

1. The schooner *Butterfly*, carrying the flag of the United States, and documented as a vessel of the United States, and having the usual equipments of vessels engaged in the slave-trade, sailed from Havana, towards the coast of Africa, on the 27th July 1829; she was captured by a British brig of war, and sent into Sierra Leone, on suspicion of being Spanish property. At the time of the capture, Isaac Morris was in command of the vessel, and was described in the ship's papers, and described himself, as a citizen of the United States; the vessel was sent by the British authorities at Sierra Leone to be dealt with by the authorities of the United States: *Held*, that to constitute the offence denounced in the second section of the act of 10th May 1800, it was not necessary that there should have been an actual transportation or carrying of slaves in the vessel of the United States, in which the party indicted served. 2. The voluntary service of an American citizen on board a vessel of the United States, in a voyage commenced with the intent that the vessel should be employed

in the slave-trade, from one foreign place to another, is an offence against the second section of the law, although no slaves had been transported in such vessel, or received on board of her. 3. To constitute the offence under the third section of the act, it was not necessary that there should be an actual transportation of slaves in a foreign vessel on board of which the party indicted served. 4. The voluntary service of an American citizen on board a foreign vessel, in a voyage commenced with intent that the vessel should be employed and made use of in the transportation of slaves, from one foreign country to another, is, in itself, and where no slaves have been transported in such vessel, or received on board of her, an offence under the third section of the act. *United States v. Morris*..... *464

SPANISH LAND GRANTS.

See CONSTRUCTION OF UNITED STATES STATUTES,
4-7: FLORIDA LAND-TITLES.

SPECIFIC PERFORMANCE.

1. A decree for a specific performance of a contract was refused, because a definite and certain contract was not made, and because the party who claimed the performance had failed to make it definite and certain on his part, by neglecting to communicate, by return of mail conveying to him the proposition of the vendor, his acceptance of the terms offered. *Carr v. Duval*..... *77
2. If it be doubtful, whether an agreement has been concluded, or is a mere negotiation, chancery will not decree a specific performance..... *Id.*
3. Specific performance of a contract by T., for the sale by him of a lot of ground in the city of Cincinnati, was asked, by a bill filed in the circuit court for the district of Ohio, by L.; the complainant in the bill had purchased the lot, and had paid, according to the contract, the proportion of the purchase-money payable to T.; by the contract, a deed, with a general warranty, was to have been given by the vendor, within three months, on which a mortgage for the balance of the purchase-money was to have been executed by the purchaser; this deed was never given nor offered. The purchaser went into possession of the lot, improved it by building valuable stores upon it, and sold a part of it; a subsequent agreement was made with the vendor, as to the rate of interest to be paid on the balance of the purchase-money; the purchase was made in 1814, and the interest, as agreed upon, was

regularly paid until 1822, when it was withheld. In 1822, the vendor instituted an action of ejectment for the recovery of the property, and he obtained possession of the same in 1824; in 1819, the purchaser was informed that one Chambers and wife had a claim on the lot, which was deemed valid by counsel; and in 1823, a suit for the recovery of the lot was instituted by Chambers and wife against T. L. and others, which was depending until after 1829. In 1825, this bill was filed, claiming from T. a conveyance of the property, under the contract of 1814, on the payment of the balance of the purchase-money and interest. The circuit court decreed a conveyance; and the decree was affirmed by the supreme court. *Taylor v. Longworth*.....*173

4. After the filing of the original bill, amended bill and answers, the circuit court considered that C., who held a part of the lot purchased by L., should be made a party complainant; and he came in and submitted to such decree as might be made between the original parties: *Held*, that this was regular. . . . *Id.*
5. There is no doubt, that time may be the essence of a contract for the sale of property; it may be made so by the express stipulations of the parties, or it may arise by implication, from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not, thus, either expressly or impliedly, of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period, been a material change in circumstances, affecting the rights, interests or obligations of the parties, in all such cases, courts of equity will refuse to decree any specific performance, upon the plain ground, that it would be inequitable and unjust. But, except under circumstances of this sort, or of an analogous nature, time is not treated by courts of equity as of the essence of the contract; and relief will be given to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract; but in all such cases, the court expects the party to make out a case free from all doubts, and to show that the relief which he asks is, under all the circumstances, equitable; and to account in a reasonable manner for his delay and apparent omission of duty..... *Id.*

STATUTES OF LIMITATION.

See LIMITATION OF ACTIONS.

SUPREME COURT.

1. Under the 25th section of the judiciary act of 1789, three things are necessary to give the supreme court jurisdiction of a case brought up by writ of error or appeal: 1. The validity of a statute of the United States, or of an authority exercised under a state, must be drawn in question. 2. It must be drawn in question on the ground that it is repugnant to the constitution, treaties and laws of the United States. 3. The decision of the state court must be in favor of its validity. *Commonwealth Bank of Kentucky v. Griffith*.....*56
2. When the decision of a state court is against the validity of a state statute, as contrary to the constitution of the United States, a writ of error does not lie to the supreme court on such judgment. *Id.*
3. By a rule of the supreme court, the practice of the English courts of chancery is the practice of the courts of equity of the United States. *Rhode Island v. Massachusetts* *210
4. In a case in which two sovereign states of the United States are litigating a question of boundary between them, in the supreme court of the United States, the court have decided, that the rules and practice should govern in conducting a suit to a final issue. *Id.*
5. The judgment of the supreme court of the United States, in a case brought by writ of error to a court of a state, must be confined to the error alleged in the decision of the state court, upon the construction of the act of congress before the state court. *Pollard's Heirs v. Kibbe*.....*353

SURETY.

1. Extending the time of payment of a bond, or a mere delay in enforcing it, will not discharge a surety, unless some agreement has been made, injurious to the interest of the surety. *Sprigg v. Bank of Mount Pleasant*.....*201
2. It is a sound and well-settled principle of law, that sureties are not to be made liable beyond their contract; and any agreement with the creditor which varies essentially the terms of the contract, without the assent of the surety, will discharge him from responsibility; but this principle cannot apply, where the surety has, by his own act, exchanged his character of surety for that of principal; and then applies to a court of equity to reinstate him to his character of surety, in violation of his own express contract..... *Id.*

TAXES.

See SALES FOR TAXES.

TREATIES.

1. Construction of the treaties with the Cherokee Indians, relative to lands within the boundary; and the acts of the legislature of the state of North Carolina, relative to the occupation and entry of lands within the Indian boundary. *Lattimer v. Poteet*. . . *4
2. It will not be denied, that the parties to a treaty are competent to determine any dispute respecting its limits; in no mode can a controversy of this nature be so satisfactorily determined as by the contracting parties. If their language in the treaty be wholly indefinite, or the natural objects called for uncertain or contradictory, there is no power but that which formed the treaty which can remedy such defects. . . . *Id.*
3. It is a sound principle of law, and applies to the treaty-making power of the government of the United States, whether exercised with a foreign nation or an Indian tribe, that all questions of boundary may be settled by the parties to the treaty; and to the exercise of that high function of the government, within its constitutional powers, neither the rights of a state or an individual can be interposed. . . . *Id.*

See CONSTRUCTION OF UNITED STATES' STATUTES,
4-8: FLORIDA LAND-CLAIMS.

TREATY WITH FRANCE.

1. The powers and duties of the commissioners under the treaty of indemnity with France, were the same as those which were exercised under the treaty with Spain, by which Florida was ceded to the United States; as decided in the cases of *Comegys v. Vasse*, 1 Pet. 212, and *Sheppard v. Taylor*, 5 *Ibid.* 710. There is a difference in the words used in the treaty and act of congress, when defining the powers of the board of commissioners; but they mean the same thing. The rules by which the board, acting under the French treaty, is directed to govern itself in deciding the cases that come before it, and the manner in which it is constituted and organized, show the purposes for which it was created. It was established for the purpose of deciding what claims were entitled to share in the indemnity provided by the treaty; and they, of course, awarded the amount to such person as appeared from the papers before them to be the rightful claimant. But there is nothing in the frame of the law establishing the board, nor in the manner of constituting and organizing it, which would

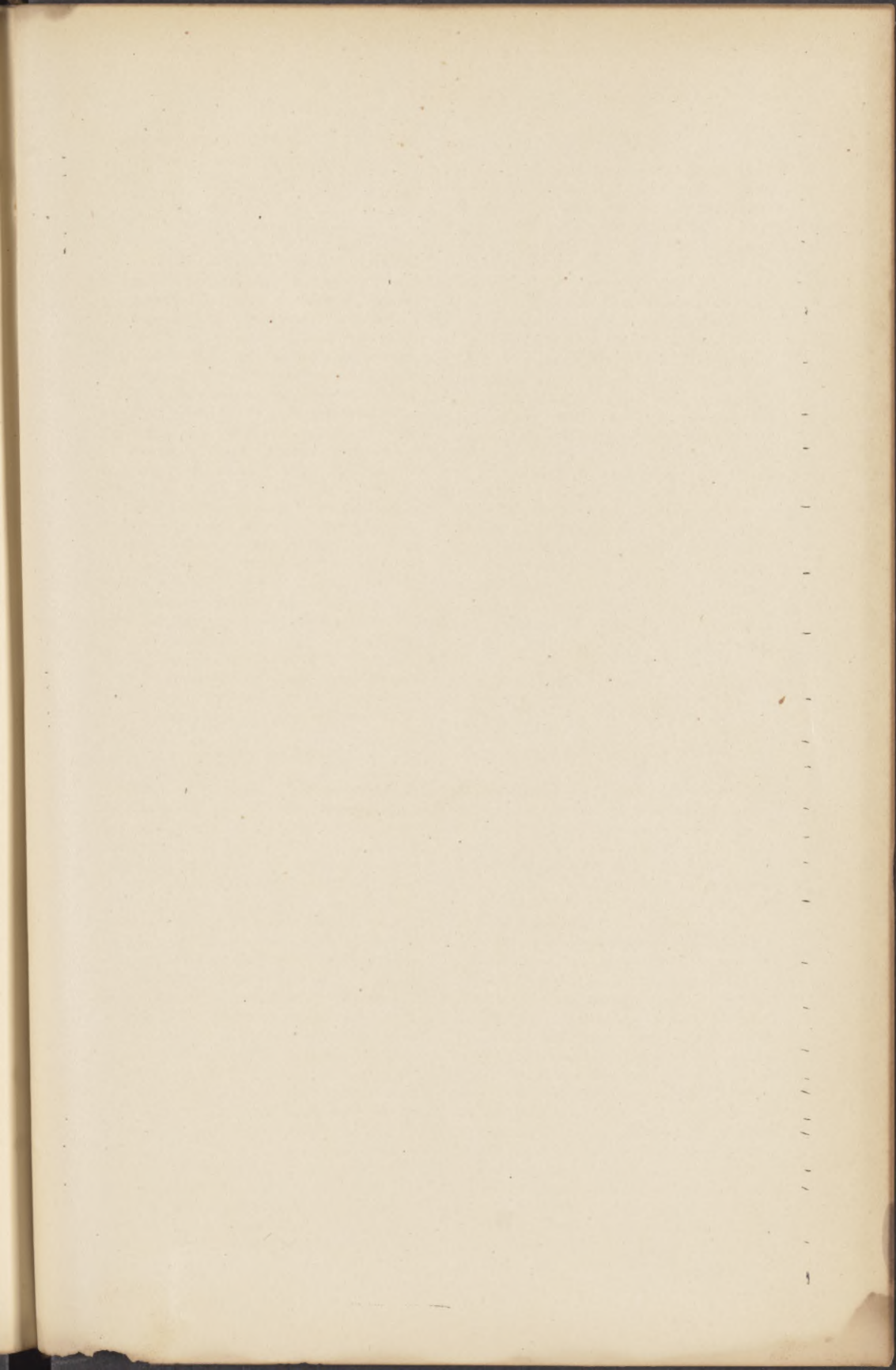
lead to the inference that larger powers were intended to be given than those conferred on the commissioners under the Florida treaty. *Prevail v. Bache*. . . . *95

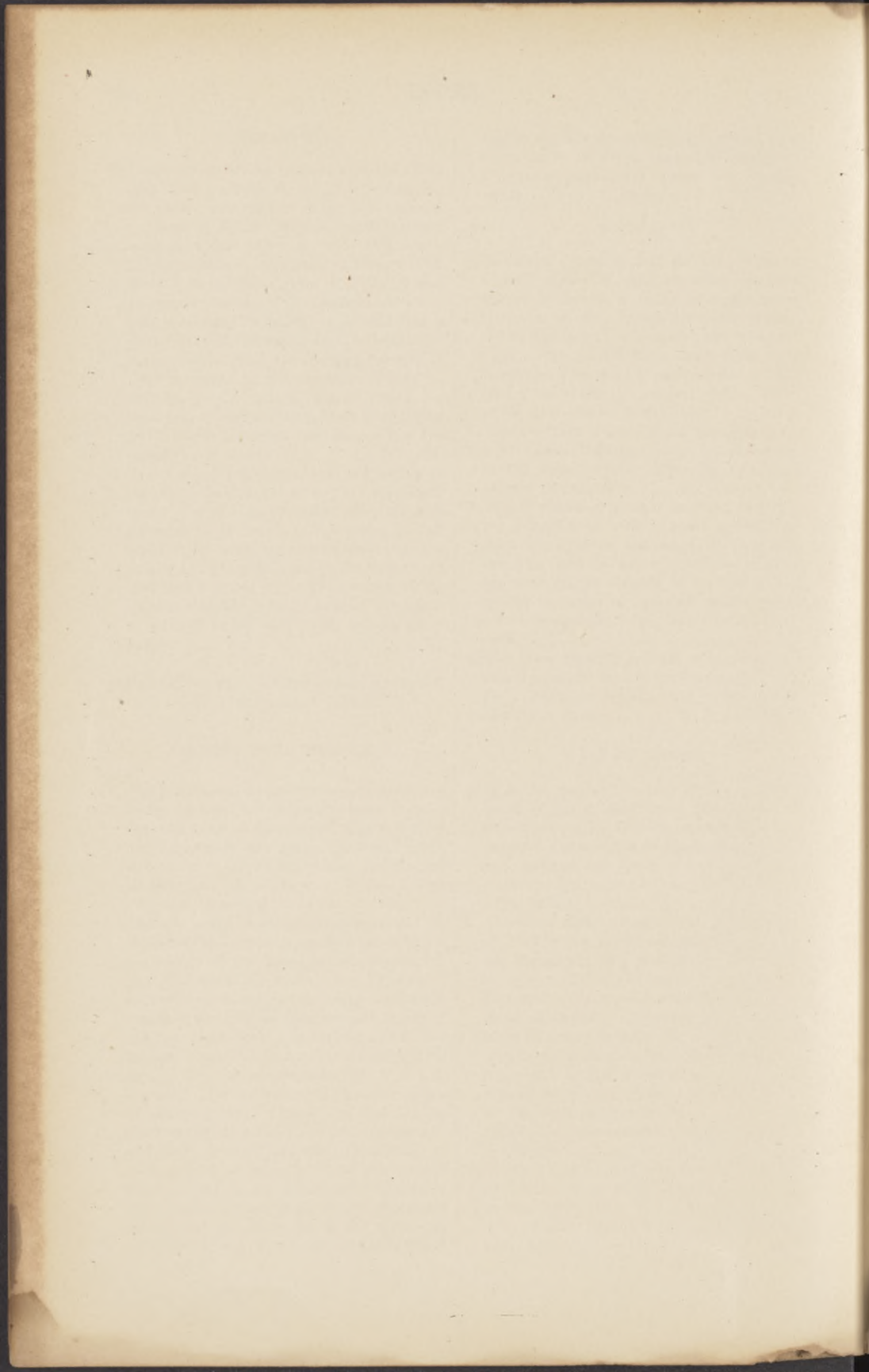
TRUSTS.

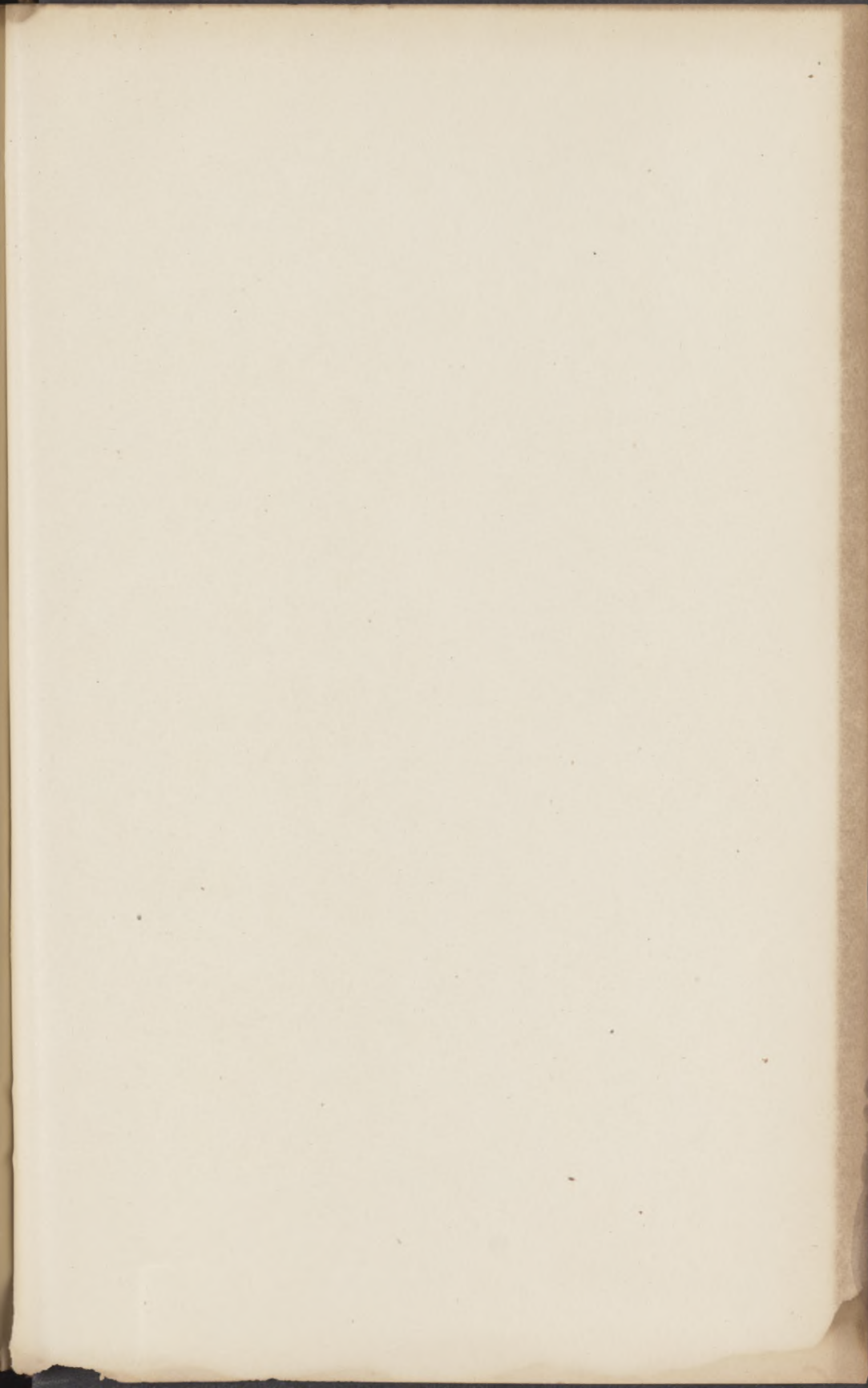
1. In case of a deed of trust, executed to secure a debt, unless in case of some extrinsic matter of equity, a court of equity never interferes to delay or prevent a sale, according to the terms of the trust; and the only right of the grantor in the deed, is the right to any surplus which may remain of the money for which the property sold. *Bank of the Metropolis v. Guttschlick*. . . . *19
2. When a trust is created for the benefit of a third party, though without his knowledge at the time, he may affirm the trust, and enforce its execution. . . . *Id.*
3. Where a deed of trust is executed to secure the payment of certain notes, and a judgment obtained on the notes, the judgment does not operate as an extinguishment of the right of the holders of the note to call for the execution of the trust; although the act of limitations might apply to the judgment. . . . *Id.*
4. The same relation as that of landlord and tenant subsists between a trustee and a *cestui que trust*, as it regards title to the estate. *Walden v. Bodley*. . . . *156

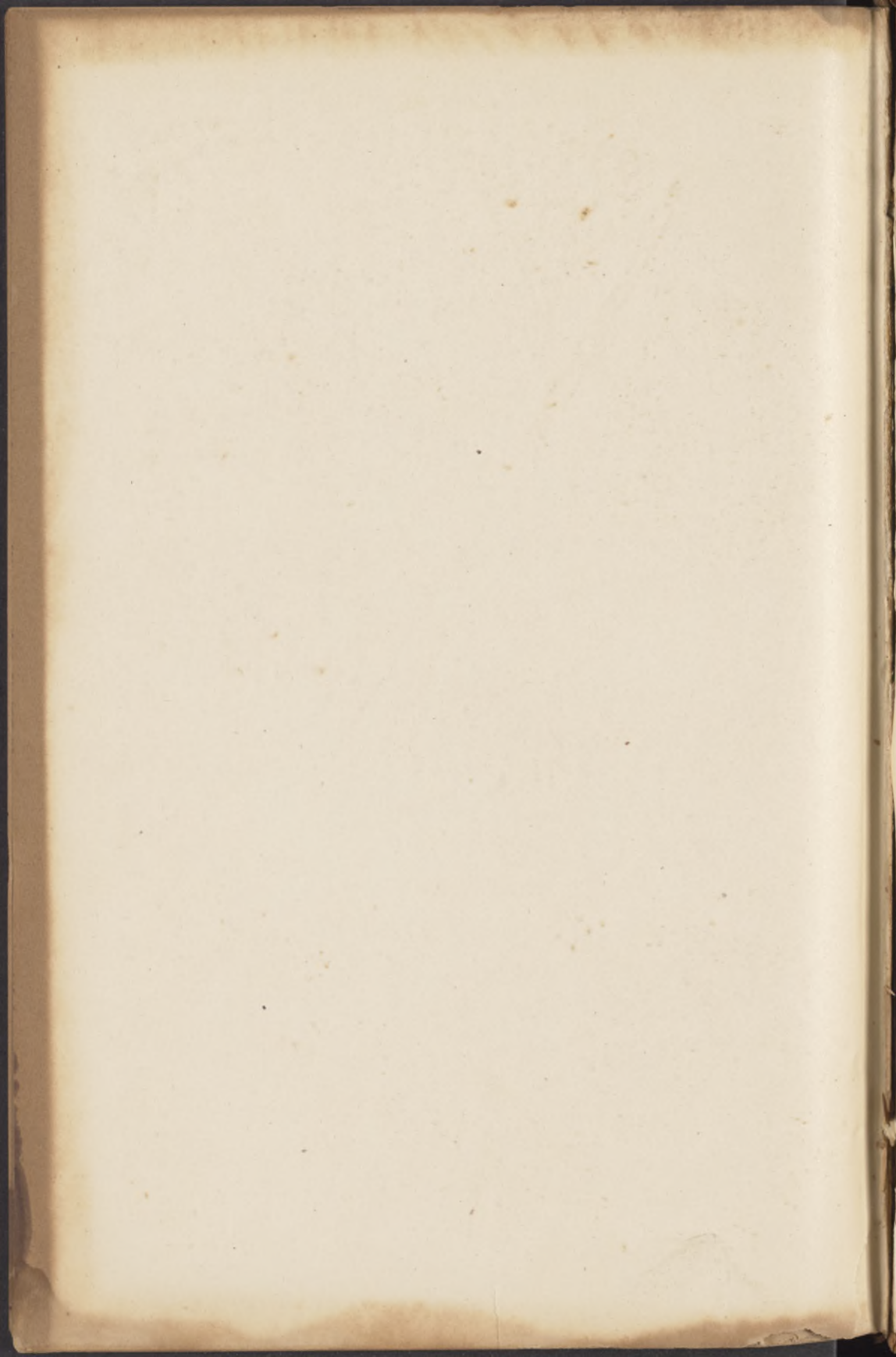
WRIT OF ERROR.

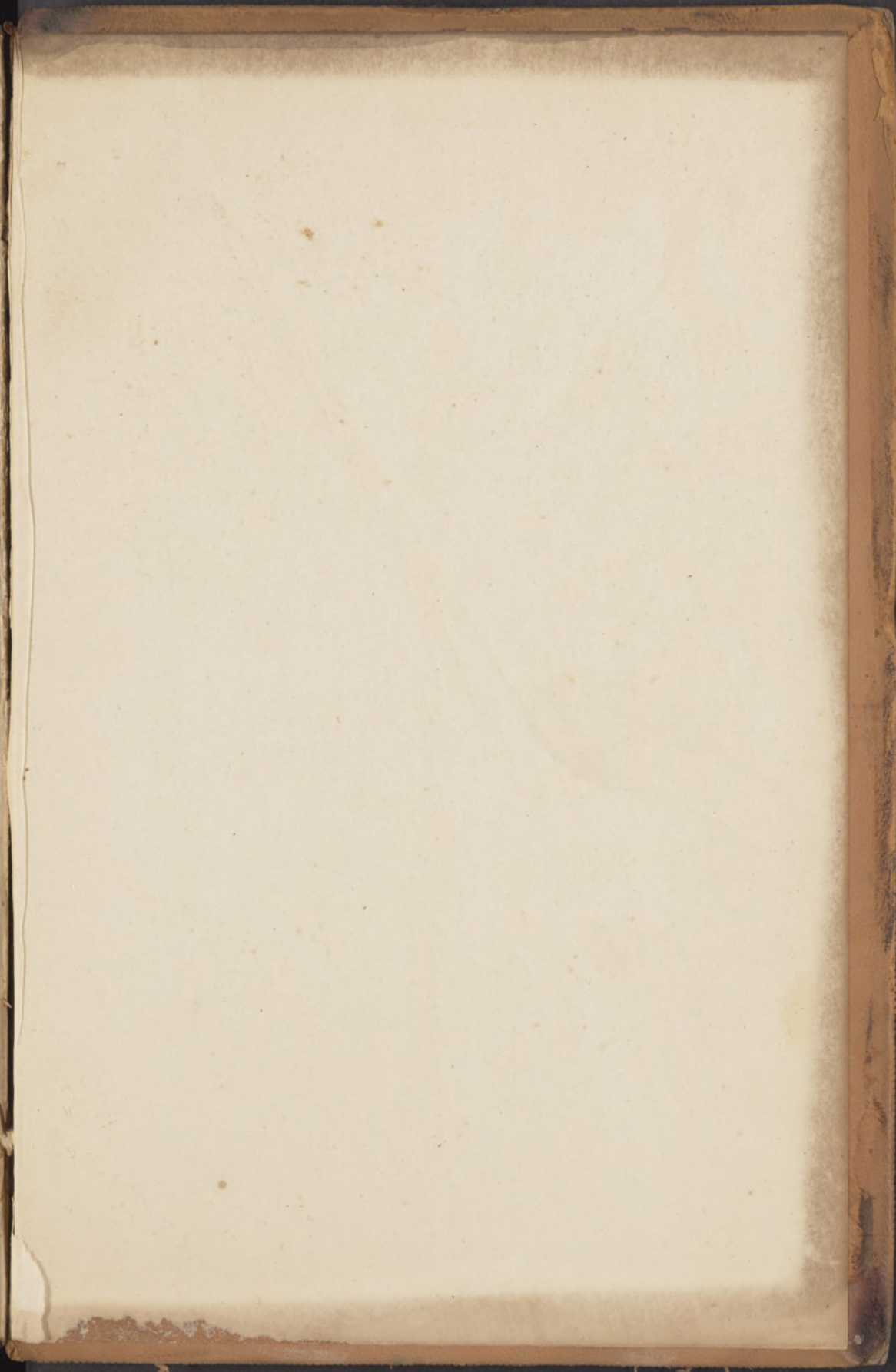
1. It is the settled doctrine of the supreme court of the United States, that a writ of error does not lie from the circuit court, on the refusal of a motion to quash an execution; such refusal not being a final judgment, under the 22d section of the judiciary act of 1789. *Evans v. Gee*. . . . *1
2. Under the 25th section of the judiciary act of 1789, three things are necessary to give the supreme court jurisdiction of a case brought up by writ of error or appeal. 1. The validity of a statute of the United States, or of an authority exercised under a state, must be drawn in question. 2. It must be drawn in question on the ground that it is repugnant to the constitution, treaties or laws of the United States. 3. The decision of the state court must be in favor of its validity. *Commonwealth Bank of Kentucky v. Griffith*. . . . *56
3. When the decision of a state court is against the validity of a state statute, as contrary to the constitution of the United States, a writ of error does not lie to the supreme court upon such a judgment. . . . *Id.*











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